Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

RAYMUNDO CERRATO SOLANO, et al.,

*Petitioners,*

versus

GULF KING 55, INC.; GULF KING SERVICES, INC.
GULF KING 55, *IN REM*, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Did the Court of Appeals for the Fifth Circuit commit an error of law when they improperly performed the choice of law analysis as required in the *Lauritzen v. Larsen, Romero v. International Terminal Operating Co.* and *Hellenic Lines, Ltd. v. Rhoditis* line of cases, specifically in erroneously mechanically applying the factors developed in those cases, improperly weighing the factors and failing to consider other factors which were pertinent and necessary to the proper determination of the issue?

Does a ship which operates exclusively in one area of an ocean lose its status as a vessel and become analogous to a fixed drilling rig for the purposes of the application of the General Maritime Law of the United States and the Jones Act?

## LIST OF PARTIES

The following are the parties to this consolidated proceeding:

1. Raymundo Cerrato Solano, Petitioner
2. Victor Manuel Urbina, Petitioner
3. Alston Hodgson Denis, Petitioner
4. Larry Hansack, Petitioner
5. Milton Pasos, Petitioner
6. Mauricio Willis Guillermo, Petitioner
7. Roy Derih William Gutierres, Petitioner
8. Jose Martinez Yanes, Petitioner
9. Benigno Jiron Mendez, Petitioner
10. Gilberto Gamboa, Petitioner
11. Gulf King Services, Inc., Respondent
12. Gulf King 55, Inc., Respondent
13. GULF KING 55, *in rem*, Respondent
14. Gulf King 49, Inc., Respondent
15. GULF KING 49, *in rem*, Respondent
16. Gulf King 50, Inc., Respondent
17. GULF KING 50, *in rem*, Respondent
18. Gulf King 46, Inc., Respondent
19. GULF KING 46, *in rem*, Respondent
20. Gulf King 51, Inc., Respondent

**LIST OF PARTIES** – Continued

21. GULF KING 51, *in rem*, Respondent
22. Gulf King 43, Inc., Respondent
23. GULF KING 43, *in rem*, Respondent
24. Gulf King 39, Inc., Respondent
25. GULF KING 39, *in rem*, Respondent

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 212 F.3d 902 (5th Cir. 2000). A copy of the opinion is included in the Appendix at App. 1-App. 11. The opinion of the United States District Court for the Southern District of Texas is reported at 57 F.Supp. 2d 437 (S.D. Tx. 1999). A copy of the District Court opinion is included in the Appendix at App. 12-App. 26.

## JURISDICTIONAL STATEMENT

On June 5, 2000, the United States Court of Appeals for the Fifth Circuit entered their opinion reversing the decision of the United States District Court for the Southern District of Texas, which had denied respondents' Motion for Summary Judgment. This Petition for Writ of Certiorari is filed within 90 days of the entry of the Fifth Circuit Court of Appeals' opinion. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2101(c) and 2106.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statute is involved in this petition:

46 U.S.C. § 688(a) (The Jones Act)

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law,

with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

## STATEMENT OF THE CASE

The consolidated cases which form the basis for this Petition for *Certiorari* concern maritime personal injury cases filed in the Southern District of Texas, Galveston Division, on behalf of ten different Nicaraguan seamen. All of the seamen were injured while working on vessels registered and documented in the United States, which fly the American Flag and which were working at the time of the accidents near the coast of Nicaragua. These vessels are owned by the respondents, who are Delaware Corporations with a principal place of business located in Texas. From their Texas headquarters respondents exercise complete control over their vessels currently working in Nicaragua.

In each of the consolidated cases,[1] Complaints were filed in the United States District Court for the Southern District of Texas pursuant to the General Maritime Law of the United States as modified by the Jones Act, 46 U.S.C. § 688. Respondents quickly filed their first Motion For Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court, the Honorable Samuel B. Kent presiding, denied the Motion.[2] In rendering his opinion, Judge Kent performed a traditional choice of law analysis as prescribed by the *Lauritzen v. Larsen, Romero v. International Terminal Operating Co.* and *Hellenic Lines, Ltd. v. Rhoditis*[3] line of cases and held that, under the facts in each of these cases, United States law applied. In so holding, Judge Kent properly recognized that the factors as stated in *Lauritzen-Rhoditis* were not designed to be exclusive or to be applied in a mechanical or numerical manner. He then properly held that the unique circumstances of this action warranted the denial of the Motions and retention of the cases in the United States.

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[1] As concerns the procedural aspects of this case, this Petition refers only to the case of *Raymundo Cerrato Solano v. Gulf King 55, Inc., Gulf King Services, Inc.*, and the *M/V GULF KING 55*. However, for purposes of this Consolidated Petition, each of the cases are identical.

[2] A copy of the Honorable Samuel B. Kent's original opinion denying respondents' Motions for Summary Judgment, dated December 11, 1998, has been attached to this Petition at Appendix "C", located at App. 27-App. 38.

[3] *Lauritzen v. Larsen*, 345 U.S. 571 (1953), *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959), and *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306 (1970).

Subsequently, Gulf King filed a second Motion for Summary Judgment in each of the ongoing cases, which were consolidated for the purposes of the Motions. On July 19, 1999, the District Court again denied the Motions. As in his first decision, Judge Kent properly looked beyond the *Lauritzen-Rhoditis* factors and recognized that, in spite of the additional information which respondents had produced and the subsequent remedial measures that they had undertaken in an effort to divorce themselves from United States law, their continued extensive financial and operational control over their fleet of vessels in Nicaragua warranted denial of the Motions.

Subsequently, on July 22, 1999, Judge Kent granted respondents' Consolidated Motion for Interlocutory Appeal. A consolidated interlocutory appeal of the district court's decision was then filed with the Court of Appeals for the Fifth Circuit. On June 5, 2000, the Fifth Circuit issued its opinion, reversing the district court. In so deciding, the Fifth Circuit ignored the rulings of this Court which required that they look beyond the factors developed in the *Lauritzen-Rhoditis* line of cases and consider the facts of the specific case under consideration. They also disregarded this Court's prior decisions which state that the choice of law factors are not to be applied mechanically but should be adjusted according to the facts of each case.[4] In reaching their decision, the Fifth Circuit also erred in relying on those cases which stand for the proposition that less importance can be placed on the law of the flag in situations in which the flagged

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[4] *See* Opinion of the Fifth Circuit at App. 11, "it is clear that the calculus ultimately dictates application of Nicaraguan law."

"vessel" is not a traditional maritime vessel and is, instead, more similar to a fixed drilling rig or stationary platform.

Amazingly, the Fifth Circuit further concluded that the activity in which the petitioners were engaged, that being working on vessels engaged in the commercial fishing industry, was not a traditional maritime activity but was instead akin to working on a fixed drilling platform.[5] This holding is in direct conflict with prior precedent of this and every other court which has considered the issue. Specifically, research has not revealed one other case in which a court has held that a vessel which is operating in navigable waters, under its own power and performing a traditional maritime activity such as commercial shrimp fishing, and which is subject to the perils that such work entails, has ever been equated to working on a permanently stationed fixed drilling platform. This decision to equate working in the dangerous traditional maritime industry of commercial fishing to the relative safety of working on a fixed drilling rig is clearly contrary to established jurisprudence and is patently in error. Furthermore, the holding of the court below sets a dangerous precedent which could be used in other maritime cases to remove significant rights from American maritime workers employed throughout the world.

Accordingly, petitioners assert that the Fifth Circuit committed an error of law in reversing the district court, and have filed this Petition for Writ of *Certiorari* seeking

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[5] "We conclude that the facts of this case are more analogous to an injury occurring on a fixed drilling platform than on a vessel in traditional maritime activity." App. 11.

to have the cases remanded back to the district court for trial on the merits.

## ARGUMENT FOR GRANTING THE WRIT

When performing a choice of law analysis in an action filed pursuant to the General Maritime Law of the United States, the Court is required to look beyond the factors as developed in the *Lauritzen-Rhoditis* line of cases. These factors were not designed to be exhaustive and as such a court must apply these traditional factors, as well as any other considerations they deem relevant, to the circumstances of the specific case.

Had the Fifth Circuit performed a proper analysis and not mechanically applied those factors, they would have determined that, under the circumstances of this action and the significant American contacts of the Gulf King operation, the district court's decision was correct.

In addition, the Fifth Circuit Court of Appeals committed an error of law when they equated the traditional maritime activity of working on a shrimping vessel with working on a fixed drilling platform. This error affected their decision and their choice of law determination and must be reversed.

## 1. Background[6]

The lead case in this consolidated Petition[7] involves injuries suffered by Raymundo Cerrato Solano which occurred while he was working for defendants Gulf King 55, Inc. and Gulf King Services, Inc., as a crewmember on their vessel, the M/V GULF KING 55. Specifically, due to a defective rope on the vessel, petitioner suffered a traumatic crush injury to his dominant hand and amputation of a portion of his hand and fingers. Mr. Solano is a Nicaraguan citizen and at the time of the accident the vessel had been working off the Nicaraguan coast.

The respondent vessel-owners are closely held Delaware corporations, with a principal place of business in Aransas Pass, Texas. The Gulf King entities are owned primarily by one family, all of whom are United States citizens and residents of Texas. These family members own 96 percent of the stock in the Gulf King companies.[8]

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[6] Petitioners have provided only a brief summary of the facts in this matter. For additional details concerning respondents' activities concerning their vessels working in Nicaragua, please refer to the decisions of the district court in this matter, attached as Appendices B and C, where the operational and financial details were discussed in detail.

[7] The remaining petitioners all suffered work-related injuries of varying severity while employed aboard various vessels owned by the respondents as part of their Nicaragua fleet. In addition, as with Mr. Solano, all of the petitioners are Nicaraguan citizens who were working on vessels located near the coast of Nicaragua at the time of their injuries.

[8] Please see the deposition of Mr. Jay Wheless, the corporate designee and Chief Financial Officer of Gulf King Services, Inc., selected portions of which have been attached as Appendix D.

App. 5. From their Texas headquarters respondents make all corporate management decisions concerning their Nicaraguan Trawler Division, as well as for their more limited American fleet.[9] This entire American-flagged, documented and registered fleet operating in Nicaragua was financed through approximately $23 million[10] in loans from the United States Government. Respondents control all financial aspects of their Nicaraguan business by transferring funds from their Texas bank accounts to their local agents in Nicaragua. As for any profits of the business, 100% of the shrimp caught in Nicaragua is imported to a Miami, Florida location, and all profits are earned from the sale of this shrimp in the United States and deposited into respondents' Texas bank accounts.[11]

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[9] Respondents, through their wholly-owned individual shipowning United States corporate subsidiaries, currently own and operate forty-three (43) shrimping vessels, thirty-four (34) of which operate exclusively in Nicaragua, with the remainder fishing from Texas. All of these vessels are documented and registered in the United States and fly the American flag. App. 5.

[10] The $23,000,000 is primarily made up of a Small Business Administration loan in the amount of $6,200,000.00 and a $15,000,000.00 loan from the United States Department of Commerce, National Marine Fishery Service. Fifth Circuit opinion, App. 6; App. 45-App. 55. As concerns re-payment of these loans, Mr. Wheless testified that respondents have ceased making payments on these loans. App. 72-App. 73.

[11] Mr. Wheless testified that respondents' Nicaragua operation has been profitable every year it has been in operation and is consistently the most profitable of their divisions, foreign or domestic, and that from 1995 to 1997 the Nicaragua fleet generated profits of more than $1.6 million. Furthermore, Mr. Wheless testified that respondents' Nicaragua fleet generates no cash flow and makes no sales in Nicaragua. App. 39-App. 41, App. 69-App. 71, App. 58.

Respondents control all of the daily business operations in Nicaragua through their Fleet Manager and Captains, most of whom were, at all pertinent times, American employees. These employees answered directly to management in Texas, with whom they were in regular daily contact by telephone and facsimile. All major financial decisions are made in Texas and payment for all major operational expenses are paid by wire-transferring the funds from Texas to Nicaragua. Seamen on the respondents' vessels are paid only after funds are wired from respondents' Texas bank to Nicaragua to be converted into local currency. All decisions concerning when to deploy vessels to Nicaragua, whether they should return to the United States and whether to sell one of the vessels can only be made by Gulf King management in Texas. App. 62-App. 63. All local supervisory employees in Nicaragua answer to management in the United States and they are in constant contact with each other, speaking by telephone two to three times a week (App. 66-App. 67), and faxing a daily log of vessel activities between the offices on a day-to-day basis. App. 66. Before any major repairs are performed on their vessels, the Fleet Manager in Nicaragua must contact Gulf King in Texas for permission to have the repairs performed. App. 68-App. 69. In fact, Gulf King considers themselves to be the "Jones Act employer" of the Captain and crew of all of their vessels operating domestically and in Nicaragua, App. 61-App. 64. Finally, the decision of whether to transfer documentation of the vessels from the United States to Nicaragua can only be made in the Texas headquarters. In reality, the only day-to-day operations in Nicaragua which are not ultimately directly or indirectly controlled by Gulf

King in Texas are the actual fishing decisions which are necessarily made by the vessel Captains.

It is against this factual backdrop which clearly establishes Gulf King's extensive United States operational control of their fleet in Nicaragua that they assert that they are not subject to liability under the Jones Act and the General Maritime Law of the United States. After reviewing in detail the manner in which the respondents directed their Nicaragua fleet and the operational control they exercised, on two separate occasions the district court performed a choice of law analysis and determined that respondents were subject to the Jones Act and the General Maritime Law of the United States. The district court's decision was proper under the facts of this case and the Fifth Circuit's reversal of Judge Kent's well-reasoned opinion is not supported by the facts or the law and must be reversed.

### 2. Choice of Law

In order to determine whether the General Maritime Law of the United States applies in an action in which foreign interests are arguably implicated, a court is required to consider the eight factors which have been developed in the *Lauritzen-Rhoditis* line of cases. Initially, the Court should be aware that these factors were applied by the district court and the Fifth Circuit only as to choice of law determination and not as to subject matter jurisdiction. While the law on this issue is unsettled, with the First, Second, Third and Fifth Circuits applying the *Lauritzen-Rhoditis* factors only to choice of law and the Fourth and Sixth Circuits applying the factors to both

choice of law and subject matter jurisdiction, it is asserted that applying the factors to the choice of law determination is proper.[12]

The *Lauritzen-Rhoditis* factors are: (1) the place of wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the seaman; (4) the allegiance of the respondent shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; (7) the law of the forum; and (8) the shipowner's base of operations. *See Sablic v. Armada Shipping, APS*, 973 F.Supp. 745, 750 (S.D.Tex. 1997), *citing Hellenic Lines, Ltd.* at 308-309. These eight factors do not constitute a complete list of all facts which affect the choice of law determination and should not be mechanically applied.[13] As such the Court must also consider any other factors that it deems as relevant to the actual case.[14] Finally, the level

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[12] *Kukias v. Chandris Lines*, 839 F.2d 860 (1st Cir. 1988); *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437 (2nd Cir. 1987); *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3d Cir. 1995) (en banc); *Solano v. Gulf King, Inc.*, 212 F.3d 902 (5th Cir. 2000); *Dracos v. Hellenic Lines*, 762 F.2d 348 (4th Cir.), *cert. denied*, 474 U.S. 945 (1985); *Gutierrez v. Diana Investments Corp.*, 946 F.2d 455 (6th Cir. 1991) (per curiam).

[13] "The *Lauritzen* test, however, is not a mechanical one." *Rhoditis* at 308.

[14] *See Rhoditis*:

> the list of seven factors in *Lauritzen* was not intended as exhaustive. As held in *Pavlou v. Ocean Traders Marine Corp.*, and approved by the Court of Appeals in the present case, the shipowner's *base of operations* is another factor of importance in determining whether the Jones Act is applicable; **and there well may be others.** (emphasis added) (citations omitted). *Rhoditis* at 309.

of importance placed on each element can be affected by consideration of the national interests to be served by application of American law.[15] In *Lauritzen* this Court addressed the issue of balancing competing national interests in maritime cases and recognized that the significance given specific factors can result in the application of the law of the United States over the law of another country who could also claim an interest.[16] *Lauritzen* at 583. Specifically, this Court has stated that

> Maritime law . . . has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority.

*Lauritzen* at 582.

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[15] "The significance of one or more factors must be considered in light of the national interest served by the assertion of Jones Act jurisdiction." *Rhoditis* at 308-09 (citations omitted).

[16] In *Lauritzen*, the United States, where plaintiff signed on the vessel and where suit was brought, Denmark, because the vessel and the plaintiff were nationals and the employment contract required that Danish law govern, and Cuba, where the accident occurred, all had a purported interest in the matter. *Lauritzen* at 582. This Court then determined that under these facts the Jones Act did not apply.

A proper choice of law determination therefore begins with an evaluation of each of the eight *Lauritzen-Rhoditis* factors, continues with the consideration of any other facts which are relevant to the case, and concludes with an evaluation of the national interests to be served should American law be applied. Whereas in some instances one factor may take on paramount importance, in another instance that factor may be irrelevant. It is the court's duty to determine which of the factors are of substantial importance in any given matter. App. 17, *citing Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015, 1018 (5th Cir. 1981), *cert. denied*, 455 U.S. 1019 (1982), *reversed on other grounds, In re Air Crash Disaster Near New Orleans, LA.*, 821 F.2d 1147 (5th Cir. 1987), *vacated and remanded* at 109 S.Ct. 1928 (1989), *on remand*, 883 F.2d 17 (5th Cir. 1989).

Accordingly, the application of these factors is necessarily very case-specific and must be separately analyzed in each factual situation and as to the manner in which each factor affects national interests. Under the facts and circumstances of this matter, petitioners assert that the most important factor is the law of the flag, which is indisputably American. The two factors which are next most important are the allegiance of the respondent shipowner, which is also American, and the base of operations, which is the factor which has caused the most difficulty in this case. Petitioners insist that respondents' true base of operations is in Texas, despite the district court's apparent reversal of position on this issue and the Fifth Circuit's acceptance of the district court's subsequent conclusion that the base of operations was in

Nicaragua.[17] Nevertheless, regardless of the ultimate decision on location of the base of operations for respondents' Nicaragua fleet, under the facts of this case and the national interests to be served by application of American law, the base of operations issue takes on lesser importance.[18]

As for the remaining identified *Lauritzen-Rhoditis* factors, it is not disputed that petitioners are Nicaraguan citizens, that the locus of the employment contract[19] was Nicaragua and that the accident occurred in Nicaraguan territorial waters. It is further acknowledged that the remaining two factors, which are the inaccessibility of a foreign forum and the law of the forum, have traditionally been given very little weight and therefore may not support either position in this matter. App. 7.

Therefore, the only factors which ultimately decide the choice of law issue in this matter are the base of

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[17] When denying respondents' first Motion for Summary Judgment, the district court found that the base of operations was in Texas. However, when denying the second Motion for Summary Judgment, the court reversed its position on this issue after considering respondents' attempts to alter the manner in which their operation is actually managed. The Fifth Circuit made no independent analysis of base of operations and simply adopted the district court's second position.

[18] As stated by this Court in *Rhoditis*, if "the liberal purposes of the Jones Act are to be effectuated, the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States." *Rhoditis* at 310.

[19] In each of these consolidated matters the petitioners did not actually sign an employment contract.

operations, which petitioners assert under the totality of circumstances is in the United States, and the law of the flag, which under prior decisions of this Court is of paramount importance and alone requires application of American law.

Specifically, under the facts of the present matter, the United States clearly has the greater interest in having its laws applied. The district court recognized this fact. The United States has a definite sovereign interest in the application of its laws to taxpayer-funded domestic corporations if, in so doing, such companies will be held accountable for the propriety of their treatment of employees as well as the particular manner in which they conduct their general business operations outside of our borders.

As for the law of the flag, prior to the Fifth Circuit's decision in this matter, it was well-settled that the law of the flag was of the utmost and primary importance. As stated by this Court in *Lauritzen* "[p]erhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag." *Lauritzen* at 584. It was further held that "the weight given to the ensign overbears most other connecting events in determining applicable law." *Id.* at 585. *See also Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1162 (5th Cir. 1987); *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 289, 295 (5th Cir. 1984), *reversed on other grounds, In re Air Crash Disaster Near New Orleans, LA.*, 821 F.2d 1147 (5th Cir. 1987), *vacated and remanded* at 109 S.Ct. 1928 (1989), *on remand*, 883 F.2d 17 (5th Cir. 1989), *citing Koke v. Phillips Petroleum Corp.*, 730 F.2d 211, 218 (5th Cir. 1984), *reversed on other grounds, In re*

*Air Crash Disaster Near New Orleans, LA.*, 821 F.2d 1147 (5th Cir. 1987), *vacated and remanded* at 109 S.Ct. 1928 (1989), *on remand*, 883 F.2d 17 (5th Cir. 1989) ["the M/V GULF QUEEN II flew the flag of the United States in 1979, a factor that, even standing alone, can be paramount in suggesting a choice of American law."]; *Warn v. M/Y Maridome*, 169 F.3d 625 (9th Cir. 1999), *cert. denied*, 120 S.Ct. 179, 145 L.Ed 2d 751, 68 U.S.L.W. 3228 (October 4, 1999) ["the only factor we have considered potentially dispositive is the law of the flag."]

In the present matter, it is undisputed that all of the respondents' vessels were flying the flag of the United States at the time petitioners suffered their injuries and that these vessels were financed primarily with taxpayers' money through United States Government loans. As for why these vessels remained registered and documented in the United States rather than legally transferring them to Nicaraguan documentation and flag once they were moved there, Mr. Wheless testified that there are several complications which prevent the company from such a transfer of registration. First and foremost, the vessels are required to be documented in the United States and fly the United States flag as a condition and requirement imposed by their primary financing creditor, the United States Government.[20] As an additional benefit

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[20] The United States government carries a preferred ship mortgage on each of the individual shrimping vessels owned by the respondents and one of the mortgage requirements, which is designed to ensure the security of their loans, is that all of respondents' vessels continue to fly the United States flag and be documented in the United States. App. 45-App. 47.

to flying the U.S. flag, Mr. Wheless testified that doing so gives his company the added protection of the United States Government/Military should security problems develop in this historically politically unstable region. App. 45-App. 47.

As vessels documented under the laws of the United States, all safety and crewing laws relating to flying the American flag apply. However, by transferring their vessels to Nicaragua, the respondents have been able to avoid complying with such laws. Specifically, respondents have been able to avoid the stringent Coast Guard safety requirements of having their vessels annually and/or periodically inspected, which inspections may have revealed the conditions which resulted in plaintiffs' injuries.[21]

As such, and due to the fact that the law of the flag is of primary importance, after considering all of the other facts and the significant American interests, the district court determined that American law applied. Unfortunately, the Court of Appeals for the Fifth Circuit elected to ignore this well-settled jurisprudence and the importance of the law of the flag. To justify their position, they equated the work on a vessel which is engaged in the traditional maritime activity of commercial fishing to that

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[21] The Fifth Circuit mistakenly stated that "[t]he vessels are not subject to United States Coast Guard safety requirements or inspections." App. 5. In fact, as vessels documented in the United States, they are subject to these safety inspection requirements but, since the vessels are located in Nicaragua, the Coast Guard is unable to perform these inspections.

of someone working on a fixed drilling platform. Petitioners submit that the only reason the Court sought to equate their fishing activities with employment on a fixed drilling platform was to foster the acceptance of the concept which has been applied in some fixed platform cases that the law of the flag should be accorded less importance. As for those decisions which place decreased importance on the law of the flag, we believe these opinions to be in direct violation of this Court's rulings concerning the importance assigned to the law of the flag. Nevertheless, even if these improper decisions are accepted as being applicable to those limited cases involving fixed drilling rigs or stationary platforms, we submit that these cases are not applicable to situations involving vessels working on the open seas and reliance on them is not appropriate under the facts of these cases.

Specifically, the Fifth Circuit relied on their decision in *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5th Cir. 1981) and the Ninth Circuit's decision in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980). *Chiazor* involved a submersible rig which had been stationed off of the coast of Nigeria for at least ten years at the time of the accident and *Phillips* involved an accident which occurred on a submersible drilling rig which had to be towed to its drilling site within the territorial waters of Trinidad. In both cases, the court determined that the importance of the law of the flag is lessened in situations in which the accident occurs on a drilling rig, which is a non-traditional maritime vessel, whose operations are at a fixed or permanent location. *See Phillips* at 87; *Chiazor* at 1019.

It is apparent that neither *Phillips* nor *Chiazor* involved a crewmember working on a traditional maritime vessel. Rather, they concerned offshore drilling platforms at long-term fixed locations, which are distinguishable in many respects from traditional maritime vessels, such as the subject shrimp boats, not the least of which are their lack of navigable mobility and the essentially land-based nature of their function. In fact, research has not revealed any other case in which working aboard an American-flagged vessel engaged in a traditional maritime activity such as commercial fishing has ever been analogized to working on a fixed rig at a permanent location.[22] The reason for this is simple: the two activities are completely dissimilar. While it is not disputed that respondents' vessels were working off the coast of Nicaragua at the time of this accident, and had been working in this area for a period of time, that should not equate them to a fixed drilling rig for purposes of determining the properly applicable maritime law.

These vessels were all individually piloted down to Nicaragua from Texas on their own power over a period of approximately two years. Once in Nicaraguan waters, the Captain of each vessel would make daily decisions as

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[22] The only recent case which petitioners located in which the court de-emphasized the importance of the law of the flag was *Neely v. Club Med Management Services, Inc.*, 63 F.3d 166 (3d Cir. 1995) (en banc). However, the case was decided on other specific factual bases and not on any decision that the law of the flag was not of primary importance. Specifically, the Third Circuit held that the law of the flag was to be given virtually no significance due to the fact that there was no evidence that the vessel actually flew the flag of any nation. *Id.* at 171.

to where to conduct their shrimping operations and how to get there. Clearly, they are not necessarily permanently restricted to the Nicaraguan coast. There is nothing which prevents them from going, under their own power, out to sea or to the coast of another country in order to best carry out their assigned function. There is also nothing which prevents them from returning to the United States should the owners once again decide it is financially expedient to do so. Therefore, the Fifth Circuit's reliance on the fixed drilling rig cases is completely misplaced in that it overlooks the very nature of vessels engaged in traditional maritime commerce.

Furthermore, the dangers of the maritime industry which are inherent to working on a vessel are different from the dangers of working on a permanently stationed fixed drilling rig. For example, in the cases of petitioners Larry Hansack, Milton Pasos and Mauricio Willis Guillermo, their injuries were the result of respondents' failure to provide adequate security in their workplace when they were attacked and shot by modern-day "pirates" who boarded their vessel to steal their cargo of shrimp and other valuables, an event which clearly could not have occurred had they not been working on a vessel at sea.[23]

As a result, the Fifth Circuit's decision to analogize petitioners' work activities at the time of their accident with someone working on a fixed drilling platform has

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[23] Despite an attempt to locate similar cases, petitioners were unable to locate another situation in which someone working on a fixed drilling platform was attacked, robbed and/or shot by pirates.

set a dangerous precedent in maritime cases. Specifically, it is not inconceivable that unscrupulous American vessel owners and operators will use the Fifth Circuit's decision to take away even more rights from Jones Act seamen on a choice of law basis. All that vessel owner/operators need to do is to assign their United States-flagged vessels to work in one assigned area, whether it is the middle of the ocean or near the coast of another country. They can then assert that their vessels are permanently assigned to this area and that the law of the flag is not relevant when an accident occurs on their vessel. This argument would work equally for fishing vessels as well as for cargo vessels which are American-flagged, owned and operated but which, due to their particular voyage assignments, often never return to a United States port. The General Maritime Law of the United States was not designed to be used in this manner but was enacted for the benefit and protection of seamen who are to be considered the wards of admiralty. *The Arizona v. Anelich*, 298 U.S. 110, 123 (1936). As such, the Fifth Circuit's decision to ignore the importance of the law of the flag and to equate the traditional maritime activity of working on a fishing vessel to that of working on a permanently-stationed drilling rig was an error of law. This decision must be overturned and petitioners should be allowed to bring their action under the Jones Act for the injuries they suffered on these American-owned and operated vessels.

In addition, the Fifth Circuit's apparent reliance on the fact that each vessel is required to procure a fishing license from the Nicaraguan government, is required to file government fishing reports, and flies a Nicaraguan

flag along with their American flag while fishing pursuant to said licenses, is likewise misplaced. As for flying the Nicaraguan flag in addition to the American flag, this was done only to publicize that the vessel had obtained the necessary licensed fishing rights and was clearly not intended to reflect any Nicaraguan ownership interest in the vessels or other particular legal significance. As such, whether these vessels flew a secondary purely symbolic local flag is irrelevant so long as they remain registered, documented and protected under the laws of the United States, since it is well-recognized that a vessel can only have one true flag of allegiance and can only sail under the flag of one state.[24] Accordingly, so long as the vessels remain registered and documented under the laws of the United States, their allegiance is to this country and they are subject to its jurisdiction.

Respondents alone have the ability to defeat this jurisdiction by simply transferring registration of their vessels to Nicaragua. Unfortunately, in order to do so they would be required to repay the $23,000,000 in loans they have received from the United States Government, which they apparently indicated some unwillingness to do. As they have made the decision to keep their vessels registered in the United States in order to retain the benefits of government financing and protection, they

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[24] *See* 1982 United Nations Convention on the Law of the Sea, Article 92, entered into force on November 16, 1994, Senate Treaty Document No. 103-39, available at United Nations Publication Sales No. E.97.V.10 (1997) and *reprinted in pertinent part* at *BENEDICTS ON ADMIRALTY*, 7th Ed. (Revised), Vol.6C, Doc. 10-6 (1998).

should also be required to accept the responsibilities imposed by the laws of the United States.[25]

As for claims that the licensing, reporting or permit requirements imposed by the Nicaraguan government somehow diminish the importance of respondents' decision to keep their vessels documented in the United States, these claims are baseless. In reality, these licensing and permit requirements merely reflect efforts by Nicaragua to regulate their environmental resources and to collect substantial licensing fees from those companies which profit from these state resources. Furthermore, these regulations are no different from the regulations which the United States applies to foreign vessels which seek to fish within our territorial waters.[26] Despite these restrictions, no one has ever asserted that the imposition of these regulations converts a foreign-flagged vessel working in our territorial waters into a United States

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[25] *See Sundance Cruises v. American Bureau of Shipping*, 7 F.3d 1077 (2nd Cir. 1993), in which the Second Circuit Court of Appeals, using *Lauritzen* as a basis, rejected an attempt by the shipowner to disavow its own choice of flag, observing that "[t]he Supreme Court has expressed concern over assertions of flag law when shipowners appear to have selected "sham" flag countries in order to avoid the more stringent requirements of other countries . . . Significantly, however, this concern is not present here, as it is Sundance, the shipowner, who seeks to avoid application of the law of the flag and thereby undo the consequence of its own choice of flag."

[26] *See* The Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1821, *et seq.*, and regulations promulgated thereunder at 50 C.F.R. Part 600, §§ 600.501, 600.502, 600.503 and 600.504 (1998).

vessel or that the laws of that foreign vessel's documented state do not properly apply to her while she is in United States territorial waters.

The regulations imposed by the Nicaraguan government were not enacted in an attempt to claim an exclusive national interest or sovereignty over a vessel. Rather, they were merely enacted to assist in the regulation of their natural resources and can have no effect on the legal status of the vessels or respondents' susceptibility to suit in the United States.

However, respondents do receive a substantial economic benefit from maintaining operational control over their Nicaragua fleet from their headquarters in Texas, including paying significantly lower wages than would be paid to American seamen in the same jobs, which is reflected in the increased profitability of this fleet over their American fleet. These benefits, as recognized by the district court, impose a "correlative duty upon them (respondents) to make commensurate provisions" for the welfare of the foreign seamen they employ. App. 25. Respondents operate in the international marketplace and, as Judge Kent recognized:

> [i]t is conceivably within the national interest that this country's corporations not be seen by foreign governments as ruthless exploiters of their country's labor pools. It is certainly within the national interest that the United States government, which has propped up Respondents

> with more than $2 million[27] [sic] in loans, not be perceived as officially or implicitly sanctioning such conduct." App. 25-App. 26.

The district court considered all of the above factors, including the extensive nature of the respondents' American control over the activity of their fleet in Nicaragua, in making its decision. The district court further recognized that the law must change, adapt and take into consideration how technology affects each factor. Specifically, the court considered how the rapidly changing nature of the way business is conducted, including the advent of international fiber optic cable and satellite telephone communications, routine use of facsimile machines, bank money wire transfers, computers and electronic internet mail, allows businesses which have foreign operational locations to be easily managed and controlled from one location. These devices, which did not exist at the time that *Lauritzen* and its progeny were developed, now allow multinational industries to be run from one central location and reflect the decreased importance which should be placed on the base of operations factor. In fact, in *Neely*, the Third Circuit Court of Appeals held that it was reasonable to apply United States law under circumstances in which the defendant's contacts with the United States, which were significantly less than in the present case, reflected a substantial connection to this country.[28]

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[27] Due to an oversight, the District Court incorrectly stated the amount loaned by the United States Government to the respondents as $2.3 million rather than $23 million. App. 26.

[28] *Neely* at 194-195. (Contacts with the United States consisted of advertising in the United States, soliciting business in the United States and the fact that the overwhelming majority

The district court accurately considered all of the facts of this matter and weighed them in conjunction with the competing interests of the governments of the United States and Nicaragua in having their laws applied, and decided that American jurisdiction was proper.[29] The Fifth Circuit conversely decided to ignore this Court's jurisprudence which requires the careful weighing of various factors and consideration of all of the circumstances of a specific case. Rather, after just listing the eight factors and the district court's decision on each of them, they simply stated that "it is clear that the calculus ultimately dictates application of Nicaraguan law." App. 11. In doing so, the Fifth Circuit has disregarded the prior decisions of this Court holding that the eight *Lauritzen-Rhoditis* factors do not constitute a definitive list of the factors which must be evaluated, to the exclusion of all other considerations, and that they are not to be mechanically or mathematically applied. Furthermore, the Fifth Circuit's decision fails to recognize the changing nature of international commerce and the maritime industry in particular. Instead, they chose to remain in the relative "dark ages" of technology when an on-site owner/manager may have necessarily been required to operate a fleet of vessels. This decision was an error of law which failed to take into account all pertinent considerations and must be reversed. Respondents must be required to answer for their conduct in failing to protect

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of defendant's income is derived from their solicitation of American tourism.)

[29] As stated by the district court, "these factors . . . are not all of equal or even comparable significance." App. 17.

the safety and well-being of their seamen-employees in accordance with the beneficent principles of the Jones Act.

## CONCLUSION

The District Court correctly performed the choice of law analysis as developed under *Lauritzen, Rhoditis* and their progeny and concluded, under the facts of this case and the manner in which the respondents operate their vessels in Nicaragua, that these cases are properly controlled by the maritime law of the United States. The district court fully and meticulously considered and weighed all factors relevant to a proper determination of American jurisdiction and equitably balanced the interests of the United States with those of Nicaragua. The Fifth Circuit committed reversible error when they improperly weighed the evidence, when they analogized working aboard a vessel engaged in the traditional maritime activity of commercial shrimping to employment on a fixed drilling platform, and when they consequently placed decreased reliance on the importance of the law of the flag.

Petitioners would respectfully suggest that the time has come for this Honorable Court to provide much-needed judicial guidance on the just and proper implementation of the *Lauritzen-Rhoditis* choice of law factors, particularly in light of the technology now utilized to conduct business internationally, and whether the law of the flag currently continues to be of primary importance

in the application of the General Maritime Law of the United States.

Respectfully submitted,

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 99-40995
Summary Calendar

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RAYMUNDO CERRATO SOLANO

Plaintiff-Appellee,

v.

GULF KING 55, INC.; GULF KING SERVICES, INC.; GULF KING 55 IN REM,

Defendants-Appellants.

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VICTOR MANUEL URBINA,

Plaintiff-Appellee,

v.

GULF KING 55 INC.; GULF KING SERVICES, INC.; GULF KING 49, IN REM; GULF KING 49, INC

Defendants-Appellants

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ALFRED HODGSON DENIS

Plaintiff-Appellee

v.

GULF KING 49, INC.; GULF KING SERVICES, INC.; GULF KING, IN REM

Defendants-Appellants

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LARRY HANSACK

Plaintiff-Appellee

v.

GULF KING 50, INCORPORATED; GULF KING SERVICES, INCORPORATED; GULF KING 50, IN REM

Defendants-Appellants

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MILTON PASOS

Plaintiff-Appellee

v.

GULF KING 46, INC.; GULF KING SERVICES, INC.; GULF KING 46, IN REM

Defendants-Appellants

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MAURICIO WILLIS GUILLERMO

Plaintiff-Appellee

v.

GULF KING 50, INC.; GULF KING SERVICES, INC.; GULF KING 50 IN REM

Defendants-Appellants

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ROY DERIH WILLIAM GUTIERRES

Plaintiff-Appellee

v.

GULF KING 51, INC.; GULF KING SERVICES, INC.

Defendants-Appellants

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JOSE MARTINEZ YANES

Plaintiff-Appellee

v.

GULF KING 51, INC.; GULF KING SERVICES, INC.; GULF KING 51, IN REM

Defendants-Appellants

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BENIGNO JIRON MENDEZ

Plaintiff-Appellee

v.

GULF KING 43, INC.; GULF KING SERVICES, INC.; GULF KING 43, IN REM

Defendants-Appellants

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GILBERTO GAMBOA

Plaintiff-Appellee

v.

GULF KING 39, INC.; GULF KING SERVICES, INC.; GULF KING 39, IN REM

Defendants-Appellants

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Appeals from the United States District Court
for the Southern District of Texas

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Before SMITH, BARKSDALE and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Ten plaintiff seamen brought work-related personal injury actions against defendant vessel owners under the Jones Act. Defendants (collectively "Gulf King") filed a consolidated motion for summary judgment claiming that Nicaraguan law governs the claims. The district court denied the motion, then certified the choice-of-law question for consolidated interlocutory appeal. We reverse.

## FACTS AND PROCEDURAL HISTORY

In each of the ten consolidated cases, the plaintiff is a Nicaraguan citizen and domiciliary who filed a complaint seeking damages for personal injuries, as well as maintenance and cure as a consequence of alleged injuries that occurred while working as a crew member on a Gulf King vessel. The claims arise from unrelated injuries occurring on different dates on various vessels owned by defendants. Each plaintiff has asserted causes of action based on the Jones Act, 46 U.S.C. § 688 (1994) and the general maritime laws of the United States; no plaintiff has asserted any action against any defendant based on the laws of Nicaragua or any other country.

Each plaintiff was hired in Nicaragua to work aboard one of the Gulf King vessels engaged in shrimping operations exclusively in the territorial waters of Nicaragua. The plaintiffs were paid with Nicaraguan currency, in Nicaragua for their work aboard the vessels, and all original payroll and employment records pertaining to their service aboard the vessels originated in Nicaragua. All decisions concerning Plaintiffs' employment aboard Gulf King vessels were made in Nicaragua. The Plaintiffs'

alleged injuries all occurred within twelve nautical miles of the Nicaraguan shoreline.

All vessels involved in these cases have been located in Nicaragua since 1994, and have not returned to the United States or conducted fishing operations outside Nicaraguan territorial waters at any time relevant to these suits. The vessels have not been operating under general maritime principles of international commerce, but rather were operating under license, regulations and control of the Nicaraguan government. Although each vessel is documented under the laws of the United States and flies the American flag, each vessel flies the Nicaraguan flag above the American flag, in accordance with Nicaraguan law. Nicaraguan-imposed regulations include the issuance of an annual license to take fish and shrimp from Nicaraguan territorial waters, the issuance of zarpe prior to each fishing trip restricting the scope and duration of that trip, physical safety inspections and vessel manning requirements, compensation and benefit obligations. The vessels are not subject to United States Coast Guard safety requirements or inspections.

Based on these facts, Gulf King moved for summary judgment and urged the district court to apply Nicaraguan law and dismiss all causes of action asserted by the Plaintiffs. Plaintiffs countered with additional facts, including that the owners of the Gulf King vessels are closely held Delaware corporations with their principal place of business in Aransas Pass, Texas. The owners of 96% of the stock of the corporations are United States citizens and Texas residents. Gulf King owns forty-three (43) shrimping vessels, thirty-four (34) of which operate exclusively in Nicaragua. The Nicaraguan Fleet Manager

and Captains answered to and were in regular daily contact with Gulf King management in Texas. Gulf King financed its vessels primarily through two loans: one in the amount of $6,200,000.00 from the Small Business Administration and one in the amount of $15,000,000.00 from the United States Department of Commerce, National Marine Fishery Service. Because both loans were made by United States agencies, Plaintiffs characterize Gulf King as "owing it all to United States taxpayers." Finally, 100% of the shrimp from the Nicaraguan vessels were imported to the United States and sold to American consumers.

## ANALYSIS

We review the denial of summary judgment *de novo*. *See Webb v. Cardiothoracic Surgery Assocs., P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). Summary judgment is proper if the evidence shows the existence of no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c).

The question of whether the Jones Act and the general maritime law of the United States apply or whether Nicaraguan law controls these maritime injury claims is governed by the Supreme Court trilogy of *Lauritzen v. Larsen*, 345 U.S. 571 (1953), *Romero v. International Terminal Operating Co.*, 358 U.S. 354 (1959) and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306 (1970). In *Lauritzen*, the Supreme Court enumerated seven factors that bear on this choice of law question: (1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner; (5)

the place of contract; (6) the inaccessibility of the foreign forum; and (7) the law of the forum. *See* 345 U.S. at 583-90. *Lauritzen* taught that courts should ascertain and value the enumerated points of contact between the transaction and the governments whose competing laws are involved. *See id.* at 582. *Lauritzen* stressed that the law of the flag is generally of cardinal importance, *see id.* at 584-86, and suggested that the last two enumerated factors should be given very little weight. *See id.* at 589-91. The list of seven factors in *Lauritzen* was not intended as exhaustive. *See Rhoditis*, 398 U.S. at 309. The "shipowner's base of operations is another factor of importance in determining whether the Jones Act is applicable; and there well may be others." *Id.* These eight factors have come to be known as the "*Lauritzen-Rhoditis* factors." *See, e.g., Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987). Each factor is to be weighed to determine whether all the factors add up to the necessary substantiality of contacts between the transaction at issue and the United States. *See Rhoditis, 398 U.S.* at 309 n. 4. Moreover, each factor must be tested in light of the underlying objective, which is to effectuate the liberal purposes of the Jones act. *See id.*, citing *Bartholomew v. Universe Tankships, Inc.*, 263 F.2d 437, 441 (2d Cir. 1959). The district court correctly set out the eight factors gleaned from Supreme Court precedent and made the following findings as to their application.

The district court looked first to the law of the flag. *See Lauritzen*, 345 U.S. at 583 (emphasizing the "cardinal importance" of the law of the flag). The district court found that the law of the flag factor favors applying

United States laws because the Gulf King vessels in question flew the American flag. While each of the vessels flew the Nicaraguan flag as well, Plaintiffs offered testimony that the Nicaraguan flags served as an indication that the vessels were authorized to fish in Nicaraguan territorial waters, rather than a sign of Nicaraguan ownership or registration.

Second, the district court examined what it termed the "next most crucial factor," the base of operations factor from *Rhoditis*, 398 U.S. at 310. In a preliminary ruling, the district court concluded that the overwhelming American flavor of Gulf King's operation favored application of American law. *See Solano v. Gulf King 55, Inc.*, 30 F. Supp. 2d 960, 963 (S.D. Tex. 1998). However, on reconsideration, the district court reversed itself, noting that the location from which a vessel's day-to-day operations are controlled is considered the base of operations, even where the defendant is a wholly owned subsidiary of an American corporation. *See Fogleman v. ARAMCO*, 920 F.2d 278, 284 (5th Cir. 1991).

The district court then listed three other factors that favored application of Nicaraguan law: (1) Plaintiffs are Nicaraguan citizens who maintain their residences in that country; (2) the place of the employment contracts was Nicaragua; and (3) the alleged wrongs occurred in the territorial waters of Nicaragua. Weighing in opposite those considerations, the district court found that the allegiance of defendants to the United States favored application of American law. Finally, the district court found that the two remaining factors – the accessibility of Nicaragua as a forum and the law of the forum – were not relevant to the determination.

The factors governing choice of law appeared closely divided to the district court, with the two factors traditionally considered the most important – choice of flag and base of operations – each favoring opposite conclusions. The district court then found itself bound to consider the national interests to be served by the choice of American law, citing *Schexnider*, 817 F.2d at 1161. The district court rejected Gulf King's argument that American interests would be served by the application of Nicaraguan law, which would reduce costs whenever one of their employees is injured on the job, thus making an American corporation more competitive in the international marketplace. Instead, the district court noted that Gulf King realizes substantial savings due to the low wages paid to the Nicaraguan seamen they employ and that Gulf King has a duty to provide for its employee's welfare. The district court therefore found that "[i]t is certainly within the national interest that the United States government, which has propped up Defendants with . . . loans, not be perceived as officially or implicitly sanctioning the [ruthless exploitation of other countries' labor pools]."

On appeal, Gulf King challenges the district court's application of the *Lauritzen-Rhoditis* factors. The Supreme Court developed the factors in cases involving vessels engaged in commercial or maritime activities that traveled the high seas, passing through territorial waters of more than one nation. The weight accorded the choice of law factors in the context of those cases was dictated by the international nature of the vessels' regular activities,

the fortuity of the location of the plaintiffs' alleged accident or injury and the need to establish a uniform, consistent law onboard a ship that traveled through waters of more than one sovereign nation. *See Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82, 87 (9th Cir. 1980). Accordingly, in the context of those cases, the Supreme Court gave substantial weight to the law of the flag and the allegiance of the defendant ship owner. *See id.* Subsequently, the Fifth Circuit has applied the *Lauritzen-Rhoditis* factors to cases where neither the seaman nor the vessel was engaged in traditional, blue-water maritime activities crossing through waters of competing nations. *See Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1019 (5th Cir. 1981), *overruled on other grounds, In re Air Crash Disaster*, 821 F.2d 1147, 1163 n. 25 (5th Cir. 1987). In *Chiazor*, the plaintiff brought suit to recover damages resulting from an accident which occurred on a submersible drilling rig off the Nigerian coast. *See id.* at 1016. Given the permanent location of the rig, we determined that "such factors as place of wrongful act, allegiance or domicile of the injured and place of contract, which may be less substantial in the shipping context, tend to take on added significance under the present circumstances." *Id.* at 1019. In sifting through the factors and determining how to weigh them in a case involving a fixed drilling platform, we relied on the Ninth Circuit opinion in *Phillips v. Amoco Trinidad Oil Co.*, 632 F.2d 82 (9th Cir. 1980). Like *Chiazor*, *Phillips* concerned an action for damages for personal injuries occurring on a drilling platform in Trinidad's territorial waters. *See id.* at 83-84. *Phillips* held that the law of the flag should not be accorded controlling weight and the allegiance of the defendant shipowner

had diminished importance, while the place of the wrongful act, the allegiance and domicile of the plaintiff workers and the place of contract should be given greater weight. *See id.* at 87.

We conclude that the facts of this case are more analogous to an injury occurring on a fixed drilling platform than on a vessel in traditional maritime commerce. For that reason, we find that the district court erred in the weight it accorded the *Lauritzen-Rhoditis* factors in this case. When we discount the law of the flag and allegiance of the defendants factors which favor application of United States law, and accord more weight to the Plaintiffs' citizenship and residence, the place of the employment contracts and the place of injury, all of which were in Nicaragua, it is clear that the calculus ultimately dictates application of Nicaraguan law. We note, further, that the district court's assumption that the application of United States law would allow the Plaintiffs a more generous recovery, while almost certainly correct, was not a valid consideration in its choice-of-law analysis. "The fact that the law of another forum may be more or less favorable to a plaintiff, however, does not determine choice of law." *Fogleman*, 920 F.2d at 284.

## CONCLUSION

For the foregoing reasons, we reverse the district court's choice of law determination and remand this case for further proceedings consistent with this opinion.

REVERSED and REMANDED.

**APPENDIX B**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

| | | |
|---|---|---|
| RAYMUNDO CERRATO SOLANO | § | CIVIL ACTION |
| V. | § | NO. G-98-095 |
| GULF KING 55, INC., GULF KING SERVICES, INC., and GULF KING 55, IN REM | § | |

**ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

This is a personal injury case arising under the Jones Act, 46 U.S.C. App. § 688 *et seq.* and general maritime law. Plaintiff allegedly suffered an injury on February 23, 1995 while serving aboard the M/V GULF KING 55. He filed this claim against Defendants on February 19, 1998. Now before the Court are Motions for Summary Judgment from Defendants Gulf King 55, Inc., and Gulf King Services, Inc. For the reasons set forth below, Defendants' Motions are **DENIED**.

## I. FACTUAL SUMMARY

Defendants Gulf King 55, Inc. And Gulf King Services, Inc. ("Gulf King") are Texas corporations with their principal places of business in Aransas Pass, Texas. Both businesses are closely held corporations in which members of the owning family, who are American citizens and

residents of Texas, own 96 percent of the stock. Defendants own forty-three shrimping vessels, thirty-four of which operate exclusively in the waters off the shore of Nicaragua. Together, these thirty-four vessels comprise what Defendants refer to as the "Nicaragua Fleet." Corporate officers in Defendants' Texas office make all decisions that concern the deployment or sale of any vessel in the Nicaragua Fleet. All operational and maintenance decisions regarding the fleet are made by a "fleet manager," a Nicaragua-based employee who is charged with running the fleet's day-to-day affairs but must consult with Defendants on all major decisions.[1]

The Nicaragua Fleet is the most profitable division owned by Defendants, which also maintain a fleet of shrimping vessels that operates in the waters off of Texas. From 1995 to 1997, the Nicaragua Fleet has generated profits of more than $1.6 million. These profits come entirely from sales in the United States of the shrimp caught in Nicaraguan waters. The shrimp are processed in Nicaragua by a Nicaraguan company called Oceanic, S.A., which receives a flat fee for its work.[2] The processed

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[1] Defendants have employed five different fleet managers since they began their operations in Nicaragua. Three of the fleet managers have been American citizens, while two have been Nicaraguan citizens. The current fleet manager is an American.

[2] When Defendants launched their shrimping operations in Nicaragua, they entered into an agreement with Oceanic through which Oceanic would process all of the shrimp caught and assist Defendants' American ship captains and fleet managers in identifying qualified Nicaraguan seamen and processing payroll requests at the completion of each voyage. Upon receipt of the payroll requests prepared by Oceanic,

shrimp are then shipped to Miami, Florida, where Defendants maintain a refrigerated warehouse. From Miami, Defendants sell the shrimp exclusively to United States-based customers. The proceeds attributable to the shrimp produced by the Nicaragua Fleet end up commingled with the proceeds from Defendants' domestic operations.

Each of the vessels in the Nicaragua Fleet sails under the United States flag. According to the testimony of company officials, sailing under the U.S. flag is a condition imposed by Defendants' three primary financing creditors, the United States Department of Commerce, the National Marine Fishery Service, and the Small Business Administration. Together, those three government agencies have loaned Defendants approximately $2.3 million since 1980. The loans are secured through liens on individual ships in both the Nicaraguan and domestic fleets. To better secure their liens, the creditor agencies require that the ships sail under the U.S. flag and be documented in the United States.

The vessels are all entirely crewed by Nicaraguan citizens and captained for the most part by American citizens. The fleet manager hires a captain for each vessel, who then hires a crew for each shrimping voyage. At the conclusion of each voyage, the fleet manager faxes a payroll request based upon the particular vessel's catch

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Defendants would wire the requested funds to Oceanic's Nicaraguan bank account. Oceanic would then pay the seamen. At the same time, Defendants agreed to purchase 50% of Oceanic's stock for the price of $1.1 million. In 1996, Defendants assumed control over all aspects of the shrimping operations, relieving Oceanic of all duties except for processing.

to Defendants in Texas. Defendants then wire the payroll funds to a Nicaraguan bank, where the money is converted into local currency and distributed to the crew.

In this case, Plaintiff is a Nicaraguan citizen who served aboard one of the vessels in Defendants' Nicaraguan Fleet, the M/V GULF KING 55, in February 1995. On February 23 of that year, he was assisting with a line that is used to raise the shrimping nets when the winch controlling the line allegedly reversed itself and sent the line paying out rapidly in the opposite direction. Plaintiff's hand was caught in the line and severely injured. He filed suit against Defendants in this Court on February 19, 1998.

## II. ANALYSIS

The issue confronting this Court is the choice of law governing Plaintiff's claim. Plaintiff alleges claims under the Jones Act, 46 U.S.C. App. § 688 *et seq.*, and the general maritime law. Defendants argue that Nicaraguan law governs this dispute and asks the Court to dismiss all causes of action brought under the Jones Act and general maritime law.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id* at 248, 106 S. Ct. at 2510. The mere *existence* of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. at 2510. If the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.; see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Dixon v. State Farm Fire & Casualty Co.*, 799 F. Supp. 691 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence, and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513.

The question of whether United States or foreign law applies to a maritime injury case is governed by the Supreme Court trilogy of *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L.Ed. 1254 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L.Ed.2d 368 (1959); and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, 26 L.Ed.2d 252 (1970). Under these cases, the following eight factors determine the choice of law: (1) the allegiance or domicile of the plaintiff; (2) the place of the contract; (3) the allegiance of the defendant shipowner; (4) the law of the flag; (5) the accessibility of the foreign forum; (6) the place of the

wrongful act; (7) the law of the forum; and (8) the defendant shipowner's base of operations. These factors, while potentially suggestive of a mechanical approach to determining choice of law, are not all of equal or even comparable significance. *See Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34; *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987); *Munusamy v. McClelland Engineers, Inc.*, 579 F. Supp. 149, 152-53 (E.D. Tex. 1984). Generally, the law of the flag and the defendant shipowner's base of operations weigh most heavily in the determination. *See Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 929 (stating that the law of the flag is of "cardinal importance" in determining applicable law); *Rhoditis*, 398 U.S. at 309-10, 90 S. Ct. at 1734-35 (holding that the defendant's New York base of operations favored United States law despite the ship's Greek flag). On the other hand, the place of the wrongful act, the inaccessibility of a foreign forum, and the law of the forum are seldom relevant to the determination. *See Sablic v. Armada Shipping APS*, 973 F. Supp. 745, 750-51 (S.D. Tex. 1997) (*citing Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 92) (stating that the place of the wrongful act carries little weight in shipboard torts because of the numerous jurisdictions through which vessels typically pass); *Munusamy*, 579 F. Supp. at 153 (noting that inaccessibility of a foreign forum and the law of the forum are irrelevant). Moreover, each of the factors may be substantial in one context but insignificant in another. *See Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1018 (5th Cir. 1981). The national interests to be served by application of United States law may also influence the weight to be assigned each factor. *See Schexnider*, 817 F.2d

at 1161 (*citing Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34).

Before the Court can analyze the *Lauritzen* factors, however, it must address two separate but related arguments offered by Defendants: first, that Nicaragua has exclusive sovereignty over the incidents forming the basis of Plaintiff's claim and that application of United States law to this action would violate "accepted principles of international comity," and second, that application of United States law would conflict with the policy of "mutual forbearance" as suggested by the Supreme Court in *Lauritzen*, 345 U.S. at 582, 73 S. Ct. at 928.

Defendants argue that the incidents forming the basis of this action occurred within Nicaragua's territorial waters, giving Nicaragua exclusive sovereignty over them, and that as a consequence any application of American law would be illegitimate. In support of this position, Defendants cite *Lauritzen*, arguing that the Supreme Court stated unequivocally in that decision that American law can never be extended beyond "internationally accepted rules of sovereignty and jurisdiction." In fact, the Supreme Court did emphasize that in applying the Jones Act, courts must not construe it in such a way " 'to violate the law of nations if any other possible construction remains. . . . ' " *See id.* at 578, 73 S. Ct. at 926 (*quoting The Charming Betsy*, 2 Cranch 64, 118). Yet to ascribe to that passage the meaning for which Defendants argue would ignore the substance of *Lauritzen*. Contrary to Defendants' argument that such considerations must be addressed before it becomes necessary to apply the *Lauritzen* choice of law factors, those considerations merely

comprise a part of the policy which analysis of the *Lauritzen* factors ultimately must serve. In other words, the factors articulated by the *Lauritzen* Court are themselves intended to answer the question of whether application of American law would comport with accepted principles of international law. *See id.* at 582-83, 73 S. Ct. at 928 (stating that courts must balance the interests of competing laws through the "weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority"). To interpret *Lauritzen* otherwise, as Defendants would have this Court do, would require substantial historical revision of the facts underlying that case; there, the plaintiff was injured while his vessel was in Havana Harbor, *see id.* at 573, 73 S. Ct. at 923, surely as much a part of Cuba's territorial waters as the shallow waters in which Defendants' vessels fish are a part of Nicaragua's.

Second, Defendants argue that application of American law would conflict with the policy of "mutual forbearance" as suggested by the *Lauritzen* Court and that as a consequence this Court must forego any such application of American law. To the extent that this argument is anything more than a rephrasing of Defendant's first argument, it fares little better under scrutiny than the first. The *Lauritzen* Court was doubtless concerned with the possibility of retaliation should American courts extend this country's law too far. *See id.* at 582, 73 S. Ct. at 928. Read in the context of the entire decision, however, this concern too is reflected in the balancing test the *Lauritzen* Court articulated. *See id.* at 582-83, 73 S. Ct. at 928.

Defendants' initial arguments thus addressed, the Court now turns to a reexamination of the *Lauritzen* factors in this case. In its previous order denying Defendants' Motion for Summary Judgment, the Court concluded that the law of the flag and Defendants' base of operations combined to make American law applicable. *See Solano v. Gulf King 55, et al.*, 30 F. Supp.2d 960, 964 (1998). However, Defendants' more recent Motion raises several interesting arguments. Defendants' counsel has done a superb job in presenting those arguments, performing, not surprisingly, to the high standard the Court has come to expect in his work. The Court will address each of his arguments in turn.

The Court first looks to the law of the flag. *See Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 929 (emphasizing the "cardinal importance" of the law of the flag). This factor would seem to clearly favor the application of American law, as the GULF KING 55, like all of Defendants' vessels, flies the American flag. However, Defendants make a forceful argument that the Court placed undue emphasis on this factor in its earlier decision. In circumstances not involving "traditional" maritime activities, where vessels may cross through waters of numerous nations, but rather involving activities largely confined to the territory of one nation, lower federal courts have placed less weight on the law of the flag, Defendants argue. In fact, Defendants cite several cases for the proposition that in situations where a vessel is permanently stationed in one jurisdiction, the law of the flag takes on less significance than the place of the alleged wrong. *See Fogleman v. Aramco*, 920 F.2d 278, 282 (5th Cir. 1991) (stating that the place of the wrongful act

assumes greater importance in cases where "the injury stems from work on a permanently situated offshore oil rig or work platform" than in traditional maritime cases); *Chiazor v. Transworld Drilling Co., LTD.*, 648 F.2d 1015, 1018-19 (5th Cir. 1981) (stating in a case involving a permanently fixed drilling platform stationed off the coast of Nigeria that certain factors may be less important than they would be in other circumstances); *Cuevas v. Reading & Bates Corp.*, 577 F. Supp. 462, 465 (S.D. Tex. 1983) ("[B]ecause of the differences between a mobile and stationary vessel or rig the importance of the [law of the flag] is much less in this case than it was in *Lauritzen*."). Defendants' reliance on those opinions for the proposition that the place of the alleged wrong assumes greater importance than the law of the flag in cases such as this one is misleading; none of those opinions states or even implies that. Regardless, the Court is convinced it placed appropriate weight on the law of the flag in its previous opinion. Defendants were required to sail under the U.S. flag as a condition of the more than $2.3 million in loans they had received from three government agencies, the United States Department of Commerce, the National Marine Fishery Service, and the Small Business Administration. In addition, Defendants themselves benefited by flying the U.S. flag. As one officer testified, U.S. registration would have protected the vessels of the Nicaragua Fleet in the event that the Nicaraguan government had tried to nationalize any of them, as it had done with other shrimping vessels during periods of political instability. While each of these vessels in the Nicaragua Fleet flew a Nicaraguan flag as well, Plaintiff has offered testimony from a corporate officer that those flags merely served as

an indication that the vessels were authorized to fish in Nicaraguan territorial waters. The flag was not a sign of Nicaraguan ownership or registration. Defendants profited immensely in several ways from their association with the United States flag; to de-emphasize its importance in this analysis would be inappropriate.

The next most crucial factor is the base of operations. *See Rhoditis*, 398 U.S. at 310, 90 S. Ct. at 1734. In its previous order, this Court concluded that the overwhelmingly American flavor of Defendant's Nicaragua operation suggested that the base-of-operations factor favored the application of American law. *See Solano*, 30 F. Supp.2d at 963. Although the vessel's day-to-day operations fell under the supervision of its captains and the Nicaragua-based fleet manager, numerous connections link the entire Nicaragua Fleet to Defendants' headquarters in Aransas Pass, Texas. First, the fleet manager must consult with Defendants on all major decisions, and Defendants make all decisions concerning the deployment or sale of a particular vessel at their Texas headquarters. Second, all shrimp caught by these vessels are shipped to Miami for sale in the United States, the proceeds of which are commingled with those from the sales traceable to Defendants' domestic operations. Finally, the vessel is entirely owned by Defendants, a pair of closely held Delaware corporations which have Texas as their principal place of business. One Texas family holds 96 percent of the stock of these corporations. The totality of those circumstances led the Court to conclude that Defendants' true base of operations is in the United States. *See id.* However, Defendants remind the Court that day-to-

day operations are the touchstone for the base of operations analysis in this Circuit, *see Bailey*, 697 F.2d at 1275; *Vaz Borralho v. Keydril Co.*, 696 F.2d 379, 389 (5th Cir. 1983). The location from which a vessel's day-to-day operations are controlled is considered the base of operations for a defendant, even where the defendant is a wholly owned subsidiary of an American corporation. *See Fogleman*, 920 F.2d at 284. As the majority of the day-to-day decisions concerning the GULF KING 55 and the other vessels in the Nicaragua fleet are made in Nicaragua, the Court concludes that the base-of-operations factor favors the application of Nicaraguan law.

Three other factors favor application of Nicaraguan law. First, Plaintiff is a Nicaraguan citizen who maintains his residence in that country. Second, the place of the employment contract entered into between Plaintiff and Defendants was Nicaragua. Third, the alleged wrong occurred in the territorial waters of Nicaragua. While the place of the alleged wrong is given little weight in "traditional" maritime cases, *see id.* at 282 (*citing Lauritzen*, 345 U.S. at 583-84, 73 S. Ct. at 929; *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 722 (5th Cir. 1990)), the Court agrees with Defendants that this factor merits some consideration given the nature of Defendants' work, which during recent years has taken place exclusively in Nicaraguan territorial waters.

On the other hand, the allegiance of Defendants supports application of American law. Defendants are two Delaware corporations who operate principally from their corporate headquarters in Texas. In addition, their stock is almost entirely controlled by two members of the owning family. The remaining factors – the accessibility

of Nicaragua as a forum, and the law of this forum – are not relevant to the determination.

The factors governing choice of law thus appear to be closely divided, with the two factors traditionally considered the most important – choice of law and base of operations – each favoring opposition conclusions. To animate its analysis of the factors, then, the Court must consider the national interests to be served by the choice of American law. *See Schexnider*, 817 F.2d at 1161 (*citing Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34); *Castillo v. Santa Fe Shipping Corp.*, 827 F. Supp. 1269, 1271 (S.D. Tex. 1992).

To this end, Defendants urge the Court to consider the interests of American companies competing in the international marketplace. Presumably, Defendants are such a company and the Court can best serve such interests by finding that Nicaraguan law applies. This argument the Court finds patently ludicrous. First, Defendants do not suggest precisely how such a finding would enable companies such as theirs to compete internationally. If their point is that application of Nicaraguan law would reduce Defendants' costs whenever one of their employees is injured on the job, thus making them more competitive, the Court responds that such an effect is not its primary concern. Second, Defendants fail to mention just what foreign market they are competing in. Defendants are shrimpers. They sell their shrimp exclusively to American customers. That means they are competing in a domestic market. The Court is therefore unconvinced that applying Nicaraguan law in this case would serve the interest of American companies competing internationally.

On the other hand, the application of American law could well serve at least one American interest, as the Court noted in its previous opinion. Defendants, who are incorporated under American laws and receive substantial benefit therefrom, are responsible for the expatriation of a significant number of American jobs. Defendants are two profitable companies that derive most of their profits from their Nicaraguan operation. This is in part because Defendants realize a substantial savings due to the lower wages received by the Nicaraguan seamen they employ. The Court has little doubt that any potential recovery to which these Plaintiffs may be entitled in Nicaragua would be significantly lower than that they might receive under the Jones Act. Humane considerations aside, the Court does not need to provide further incentive for corporations like these Defendants to employ foreign nationals in their fishing operations to the exclusion of higher-paid American seamen. Defendants have already received the benefit of their bargain in the form of lower wage obligations and the resulting greater profits; allowing them to escape the obligations of the Jones Act while maintaining such extensive control over the operation of the Nicaragua Fleet vessels such as M/V GULF KING 55 would be a windfall. In addition, the Court notes that Plaintiff and the other Nicaraguan seamen who are employed by Defendants confer a greater economic benefit upon Defendants than do the American seamen Defendants employ in domestic waters. This only underscores the dictate that the control exercised by Defendants over these foreign seamen confers a correlative duty upon them to make commensurate provisions for their welfare. It is conceivably within the national interest that this

country's corporations not be seen by foreign governments as ruthless exploiters of their countries' labor pools. It is certainly within the national interest that the United States government, which has propped up Defendants with more than $2 million in loans, not be perceived as officially or implicitly sanctioning such conduct.

Accordingly, the Court concludes based on an analysis of the choice of law factors and the national interests at issue that American law governs this action. Defendants' Motions for Summary Judgment are each **DENIED**.

## III. CONCLUSION

For the reasons set forth above, Defendants' Motions for Summary Judgment are **DENIED**. The parties are **ORDERED** to bear their own taxable costs and expenses incurred herein to date.

**IT IS SO ORDERED.**

**DONE** this 19th day of July, 1999 at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

| | | |
|---|---|---|
| RAYMUNDO CERRATO SOLANO | § | |
| V. | § | CIVIL ACTION |
| | § | NO. G-98-095 |
| GULF KING 55, INC., | § | |
| GULF KING SERVICES, INC., | § | |
| and GULF KING 55, IN REM | § | |

**ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**

This is a personal injury case arising under the Jones Act, 46 U.S.C. App. § 688 et seq. and general maritime law. Plaintiff allegedly suffered an injury on February 23, 1995 while serving aboard the M/V GULF KING 55. He filed this claim against Defendants on February 19, 1998. Now before the Court is Defendants' Motion to Dismiss or, in the alternative, Motion for Summary Judgment.[1]

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[1] The factual and legal issues concerning choice of law in this case are substantially identical to those in the case before this Court styled *Victor Manuel Urbina v. Gulf King 55 Inc. and Gulf King Services, Inc. and GULF KING 49 in rem*, Civil Action No. G-98-143. In that case, the only difference is the identity of the Plaintiff, a Nicaraguan seaman who was injured on a different vessel belonging to Defendants. Accordingly, the Court has issued a substantially similar order in that case addressing the choice of law question raised by Defendants.

For the reasons set forth below, Defendants' Motion is **DENIED**.

## I. FACTUAL SUMMARY

Defendants Gulf King 55, Inc. And Gulf King Services, Inc. ("Gulf King") are Texas corporations with their principal places of business in Aransas Pass, Texas. Both businesses are closely held corporations in which members of the owning family, who are American citizens and residents of Texas, own 96 percent of the stock. Defendants own forty-three shrimping vessels, thirty-four of which operate exclusively in the waters off the shore of Nicaragua. Together, these thirty-four vessels comprise what Defendants refer to as the "Nicaragua Fleet." Corporate officers in Defendants' Texas office make all decisions that concern the deployment or sale of any vessel in the Nicaragua Fleet. All operational and maintenance decisions regarding the fleet are made by a "fleet manager," a Nicaragua-based employee who is charged with running the fleet's day-to-day affairs but must consult with Defendants on all major decisions.[2]

The Nicaragua Fleet is the most profitable division owned by Defendants, which also maintain a fleet of shrimping vessels that operates in the waters off of Texas. From 1995 to 1997, the Nicaragua Fleet has generated profits of more than $1.6 million. These profits come

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[2] Defendants have employed five different fleet managers since they began their operations in Nicaragua. Three of the fleet managers have been American citizens, while two have been Nicaraguan citizens. The current fleet manager is an American.

entirely from sales in the United States of the shrimp caught in Nicaraguan waters. The shrimp are processed in Nicaragua by a Nicaraguan company called Oceanic, S.A., which receives a flat fee for its work.[3] The processed shrimp are then shipped to Miami, Florida, where Defendants maintain a refrigerated warehouse. From Miami, Defendants sell the shrimp exclusively to United States-based customers. The proceeds attributable to the shrimp produced by the Nicaragua Fleet end up commingled with the proceeds from Defendants' domestic operations.

Each of the vessels in the Nicaragua Fleet sails under the United States flag. According to the testimony of company officials, sailing under the U.S. flag is a condition imposed by Defendants' three primary financing creditors, the Department of Commerce, the National Marine Fishery Service, and the Small Business Administration. Together, those three government agencies have loaned Defendants approximately $2.3 million since 1980. The loans are secured through liens on individual ships in both the Nicaraguan and domestic fleets. To better

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[3] When Defendants launched their shrimping operations in Nicaragua, they entered into an agreement with Oceanic through which Oceanic would process all of the shrimp caught and assist Defendants' American ship captains and fleet managers in identifying qualified Nicaraguan seamen and processing payroll requests at the completion of each voyage. Upon receipt of the payroll requests prepared by Oceanic, Defendants would wire the requested funds to Oceanic's Nicaraguan bank account. Oceanic would then pay the seamen. At the same time, Defendants agreed to purchase 50% of Oceanic's stock for the price of $1.1 million. In 1996, Defendants assumed control over all aspects of the shrimping operations, relieving Oceanic of all duties except for processing.

secure their liens, the creditor agencies require that the ships sail under the U.S. flag and be documented in the United States.

The vessels are all entirely crewed by Nicaraguan citizens and captained for the most part by American citizens. The fleet manager hires a captain for each vessel, who then hires a crew for each shrimping voyage. At the conclusion of each voyage, the fleet manager faxes a payroll request based upon the particular vessel's catch to Defendants in Texas. Defendants then wire the payroll funds to a Nicaraguan bank, where the money is converted into local currency and distributed to the crew.

In this case, Plaintiff is a Nicaraguan citizen who served aboard one of the vessels in Defendants' Nicaraguan Fleet, the M/V GULF KING 55, in February 1995. On February 23 of that year, he was assisting with a line that is used to raise the shrimping nets when the winch controlling the line allegedly reversed itself and sent the line paying out rapidly in the opposite direction. Plaintiff's hand was caught in the line and severely injured. He filed suit against Defendants in this Court on February 19, 1998.

## II. ANALYSIS

The issue confronting this Court is the choice of law governing Plaintiff's claim. Defendants have moved the Court to dismiss Plaintiff's cause of action for failure to state a claim for which relief may be granted. In the alternative, Defendants ask the Court to find based on the summary judgment evidence before it that Nicaraguan law governs this dispute and dismiss all causes of action

brought under the Jones Act and general maritime law under the doctrine of forum non conveniens. Each party has submitted evidence outside the pleadings. Consequently, the Court will treat this motion as a Motion for Summary Judgment.

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). When a motion for summary judgment is made, the nonmoving party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Issues of material fact are "genuine" only if they require resolution by a trier of fact. *See id* at 248, 106 S. Ct. at 2510. The mere *existence* of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Only disputes over facts that might affect the outcome of the lawsuit under governing law will preclude the entry of summary judgment. *See id.* at 247-48, 106 S. Ct. at 2510. If the evidence is such that a reasonable fact-finder could find in favor of the nonmoving party, summary judgment should not be granted. *See id.*; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L.Ed.2d 538 (1986); *Dixon v. State Farm Fire & Casualty Co.*, 799 F. Supp. 691 (S.D. Tex. 1992) (noting that summary judgment is inappropriate if the evidence could lead to different factual findings and conclusions). Determining credibility, weighing evidence,

and drawing reasonable inferences are left to the trier of fact. *See Anderson*, 477 U.S. at 255, 106 S. Ct. at 2513.

The question of whether United States or foreign law applies to a maritime injury case is governed by the Supreme Court trilogy of *Lauritzen v. Larsen*, 345 U.S. 571, 73 S. Ct. 921, 97 L.Ed. 1254 (1953); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 79 S. Ct. 468, 3 L.Ed.2d 368 (1959); and *Hellenic Lines Ltd. v. Rhoditis*, 398 U.S. 306, 90 S. Ct. 1731, 26 L.Ed.2d 252 (1970). Under these cases, the following eight factors determine the choice of law: (1) the allegiance or domicile of the plaintiff; (2) the place of the contract; (3) the allegiance of the defendant shipowner; (4) the law of the flag; (5) the accessibility of the foreign forum; (6) the place of the wrongful act; (7) the law of the forum; and (8) the defendant shipowner's base of operations. These factors, while potentially suggestive of a mechanical approach to determining choice of law, are not all of equal or even comparable significance. *See Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34; *Schexnider v. McDermott International, Inc.*, 817 F.2d 1159, 1161 (5th Cir. 1987); *Munusamy v. McClelland Engineers, Inc.*, 579 F. Supp. 149, 152-53 (E.D. Tex. 1984). Generally, the law of the flag and the defendant shipowner's base of operations weigh most heavily in the determination. *See Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 929 (stating that the law of the flag is of "cardinal importance" in determining applicable law); *Rhoditis*, 398 U.S. at 309-10, 90 S. Ct. at 1734-35 (holding that the defendant's New York base of operations favored United States law despite the ship's Greek flag). On the other hand, the place of the wrongful act, the inaccessibility of a foreign forum, and the law of the forum are seldom relevant to

the determination. *See Sablic v. Armada Shipping APS*, 973 F. Supp. 745, 750-51 (S.D. Tex. 1997) (citing *Lauritzen*, 345 U.S. at 583, 73 S. Ct. at 92) (stating that the place of the wrongful act carries little weight in shipboard torts because of the numerous jurisdictions through which vessels typically pass); *Munusamy*, 579 F. Supp. at 153 (noting that inaccessibility of a foreign forum and the law of the forum are irrelevant). Moreover, each of the factors maybe substantial in one context but insignificant in another. *See Chiazor v. Transworld Drilling Co.*, 648 F.2d 1015, 1018 (5th Cir. 1981). The national interests to be served by application of United States law may also influence the weight to be assigned each factor. *See Schexnider*, 817 F.2d at 1161 (citing *Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34).

In the present case, the law of the flag is undisputedly that of the United States. The M/V GULF KING 55 was flying the U.S. flag at the time of the accident. Defendants were required to sail under the U.S. flag as a condition of the loans they had received from three government agencies. In addition, Defendants themselves benefited by flying the U.S. flag. As one officer testified, U.S. registration would have protected the vessels of the Nicaragua Fleet in the event that the Nicaraguan government had tried to nationalize any of them, as it had done with other shrimping vessels during periods of political instability. While each of these vessels in the Nicaragua Fleet flew a Nicaraguan flag as well, Plaintiff has offered testimony from a corporate officer that those flags merely served as an indication that the vessels were authorized to fish in Nicaraguan territorial waters. The flag was not

a sign of Nicaraguan ownership or registration. The law of the flag clearly favors application of American law.

Defendants argue that the base of operations of the vessel involved in this [sic] accidents provides a counterweight to the law of the flag. The vessel, like all of those vessels in the Nicaragua Fleet, was permanently stationed in Nicaragua and plied its trade in Nicaraguan waters, departing from and returning to Nicaraguan ports at all times. In some circumstances, this would result in the base of operations factor favoring Nicaraguan law. *See, e.g, Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 723 (5th Cir. 1990); *Bailey v. Dolphin International, Inc.*, 697 F.2d 1268, 1275 n.22 (5th Cir. 1983), *overruled on other grounds, In re. Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147 (5th Cir. 1987). However, the Court is not convinced that the real base of operations is in Nicaragua. *See Rhoditis*, 398 U.S. at 310, 90 S. Ct. at 1734-35 (warning that "the facade of the operation must be considered as minor, compared with the real nature of the operation and a cold objective look at the actual operational contacts that this ship and this owner have with the United States."). Although the vessel's day-to-day operations fell under the supervision of its captains and the Nicaragua-based fleet manager, numerous connections link the entire Nicaragua Fleet to Defendants' headquarters in Aransas Pass, Texas. First, the fleet manager must consult with Defendants on all major decisions, and Defendants make all decisions concerning the deployment or sale of a particular vessel at their Texas headquarters. Second, all shrimp caught by these vessels are shipped to Miami for

sale in the United States, the proceeds of which are commingled with those from the sales traceable to Defendants' domestic operations. Finally, the vessel is entirely owned by Defendants, a pair of closely held Delaware corporations which have Texas as their principal place of business. One Texas family holds 96 percent of the stock of these corporations. Together, these connections lead to the conclusion that Defendants' true base of operations is in the United States. Although day-to-day operations are the touchstone for the base of operations analysis in this Circuit, *see Bailey*, 697 F.2d at 1275 n.22, the fact that the fleet manager required corporate approval for any major day-to-day decisions mitigates against concluding that Nicaragua was Defendants' base. Consequently, the base of operations favors application of U.S. law.

Similarly, the allegiance of Defendants supports application of American law. Defendants are two Delaware corporations who operate principally from their corporate headquarters in Texas. In addition, their stock is almost entirely controlled by two members of the owning family.

Two factors favor application of Nicaraguan law. First, Plaintiff is a Nicaraguan citizen who maintains his residence in that country. Second, the place of the employment contract entered into between Plaintiff and Defendants was Nicaragua. The remaining factors – the place of the alleged wrong, the accessibility of Nicaragua as a forum, and the law of this forum – are not relevant to the determination.

The scorecard of factors, so to speak, thus favors the applicability of American law, with the two most significant factors both supporting that conclusion. The application of these factors is not a mechanical test, of course; the Court is instructed by the controlling precedent to consider the national interests to be served by the choice of American law. *See Schexnider*, 817 F.2d at 1161 (citing *Rhoditis*, 398 U.S. at 308-09, 90 S. Ct. at 1733-34); *Castillo v. Santa Fe Shipping Corp.*, 827 F. Supp. 1269, 1271 (S.D. Tex. 1992). The Court concludes that applying the Jones Act and general maritime law to this dispute would serve at least one interest. Defendants are two profitable companies that derive most of their profits from their Nicaraguan operation. This is in part because Defendants realize a substantial savings due to the lower wages received by the Nicaraguan seamen they employ. The Court has little doubt that any potential recovery to which these Plaintiffs may be entitled in Nicaragua would be significantly lower than that they might receive under the Jones Act. Humane considerations aside, the Court does not need to provide further incentive for corporations like these Defendants to employ foreign nationals in their fishing operations to the exclusion of higher-paid American seamen. Defendants have already received the benefit of their bargain in the form of lower wage obligations and the resulting greater profits; allowing them to escape the obligations of the Jones Act while maintaining such extensive control over the operation of the Nicaragua Fleet vessels such as M/V GULF KING 55 would be a windfall and smacks of manifest exploitation of third-world employees who are least in a position to defend themselves. In addition, the Court notes that

Plaintiff and the other Nicaraguan seamen who are employed by Defendants confer a greater economic benefit upon Defendants than do the American seamen Defendants employ in domestic waters. This only underscores the dictate that the control exercised by Defendants over these foreign seamen confers a correlative duty upon them to make commensurate provisions for their welfare. Accordingly, the Court holds that American law, specifically the Jones Act and the general maritime law, governs this action.[4] Defendants's Motion for Dismissal, and, in the alternative, Summary Judgment is therefore DENIED.

## III. CONCLUSION

The Court finds as a matter of law that the Jones Act and the general maritime law of the United States governs Plaintiff's claim. This case will be set for trial at a later date. Without commenting on the merits of the claim or defenses asserted, this Court will examine them again at that time.

For the reasons set forth above, Defendants' Motion to Dismiss for Failure to State a Claim or, in the alternative, for Summary Judgment is **DENIED**. The parties are

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[4] Because United States law governs Plaintiff's claim, the Court need not consider Defendants' arguments in favor of forum non conveniens dismissal. *See Shexnider*, 817 F.2d at 1161 ("First the court determines that United States law does not apply, and then the court balances public and private convenience factors set forth in judicial precedent to determine whether to dismiss the case [on grounds of forum non conveniens]").

**ORDERED** to bear their own taxable costs and expenses incurred herein to date.

**IT IS SO ORDERED.**

**DONE** this 10th day of December, 1998 at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

## APPENDIX D

[28] operations?

A. Say that one more time, please.

Q. Okay. I take it from your responses that there was a policy decision made in 1992 that the P&I type personal injury coverage for crew members on your shrimp boats was no longer affordable. In making that policy decision, was there ever a distinction made between the domestic and foreign operations?

A. No, there was not.

Q. So the coverage that was in place was dropped for all the boats at the same time for the same reason?

A. That's correct.

MR. AMMANN: Just so we're clear, I don't think there were any boats in Nicaragua in 1992.

THE WITNESS: Right, right.

MR. STEINMAN: No, I understand that.

Q. (BY MR. STEINMAN) Let me, let me add to that question the fact that in '94 and '95 you still did not carry that type of insurance, did not purchase it; is that correct?

A. That's correct.

Q. For the same reasons?

* * *

[45] unprofitable, with the exception of 1997 –

Q. Okay.

A. – *the domestic fleet showed a slight profit.*

Q. Last year, okay. How about the Nicaraguan fleet since 1993, late '93, when that operation began, has it been profitable?

A. Yes, it has.

Q. Has it been profitable in every year?

A. Yes.

Q. How about the ice and fuel division, has that been profitable?

A. Yes.

Q. In every year since '92?

A. Yes.

Q. And the shrimp company?

A. Marginal profitability every year.

Q. Of those four – I'll call them divisions – ice and feel, shrimp company, domestic fleet, and Nicaraguan fleet, which has been the most profitable since 1993?

A. On a cumulative basis?

Q. Yes.

A. The Nicaraguan fleet with Gulf King Ice & Fuel being a –

[46] Q. A close second?

A. – second.

Q. In 1994, calendar year 1994, what was the bottom-line profit of the Nicaraguan fleet operation? I know

*it's not going to be to the penny,* but just give me a general idea.

A. I'd like to refer to financials on that.

Q. Okay. It may help you and us if we ask for production of those financial statements from 1993 to the present. And obviously 1997 and – well, '98 would not have probably been prepared yet; is that correct?

A. That's correct.

Q. 1997 would include two statements?

A. That's correct.

MR. STEINMAN: We're going to ask for production of those as soon as possible, and I'm not going to press Mr. Wheless on an answer, a specific answer to those questions because he doesn't have the documents with him; is that correct?

A. That's correct.

MR. AMMANN: If you have ball park figures, you can use them.

Q. (BY MR. STEINMAN) Can you give me just a ball-park idea of the 1994 profitability of the

* * *

[57] Q. Okay. The – close to 50 percent, let's say, of the captains in 1995 that were Americans, did they live in Nicaragua during this period of time?

A. Yes, they did.

Q. And by that I mean as opposed to being down there to work and when they were off work coming back to the states to live?

A. That's correct.

Q. They lived there?

A. That is correct.

Q. The boats operated in the Nicaraguan troller fleet, are they officially registered in the United States?

A. Yes, they are.

Q. Separate and apart from any licensing or registration requirements for the purpose of fishing, do the vessels themselves have any official registration documents in Nicaragua?

A. No, they do not.

Q. So that strictly for the purpose of the status of the vessel, as a registered vessel, all of the boats operating in Nicaragua are US flag, US registered vessels; is that correct?

A. That is correct.

Q. Now, I understand that the vessels while in [58] operation also fly the Nicaraguan flag. Are you aware of that?

A. Yes.

Q. Do you know the reason why they fly the Nicaraguan flag?

A. Given the fact that they're fishing in Nicaraguan waters to indicate that – so it's a clear signal that they –

the vessels have a right to be fishing in Nicaragua. Obviously, we do have the boats licensed for Nicaragua; but there is no outward visible sign that they are entitled to be in Nicaragua, so they fly the Nicaraguan flags.

Q. It's correct, is it not, that all of the outward visible signs of those vessels indicate that they are American?

MR. AMMANN: I'll object to the form as vague.

Q. (BY MR. STEINMAN) Well, I can – I could be more specific, if you'd like me to. They have the American flag on them; is that correct?

A. That's correct.

Q. They have an American official registration number on the side of them; is that correct?

A. Correct.

Q. They have a transom designation of the name [59] of the vessel Gulf King 55 or 49, and under that it says Aransas Pass, Texas; is that correct?

A. That's correct.

Q. The vessels are all painted virtually identically as a homogeneous fleet; is that correct?

A. That's correct.

Q. Is it a requirement of your fishing licensing in Nicaraguan waters that you fly the Nicaraguan flag?

A. I don't know the specific answer to that question, whether that's a specific requirement.

Q. Would it be fair to say that your understanding of the situation is that since the fleet is operating within the territorial waters of Nicaragua and licensed to fish, thereby the Nicaraguan government, it seems appropriate to fly the Nicaraguan flag to make it clear that that's the case?

A. Yes.

Q. This is, in effect, the Nicaraguan fleet of Gulf King, the American company, so therefore, we'll fly the Nicaraguan flag along with our flag; is that correct?

A. That's correct.

Q. It makes sense. I understand. However, it [60] is also correct, is it not, that the flying of the Nicaraguan flag does not signify or indicate that the vessel is – has any ownership interest that is Nicaraguan, is registered as a vessel for Nicaraguan purposes or has any other Nicaraguan documentation from the standpoint of the vessel itself; is that correct?

A. It is no proof of that. If we had had the ability to do so – certainly, from the standpoint of the operation, the boats would be flying only the Nicaraguan flag.

Q. Okay.

A. Our flying of the US flag on the boats – and the main – well, maintaining the vessels as US documented vessels flying under the US flag is a requirement of our lender, and there would be, there would be benefits to the company operating in Nicaragua if we were able to actually register them as Nicaraguan vessels. There are tax benefits, licensing benefits that, that we could enjoy. But

our number one secured lender, secured creditor has insisted that we maintain the US, US documentation.

Q. Who is that number one secured creditor?

A. United States Department of Commerce, National Marine Fishery Service.

[61] Q. So that the financing for the vessels themselves has been obtained through the US Government?

A. That is correct.

Q. This would be in the nature of mortgages on the vessels?

A. That's correct. US Department of Commerce and the Small Business Administration are the two –

Q. Agencies of the US Government?

A. That's correct.

Q. And one of the requirements of taking money from those US Government agencies in order to finance this operation is that you continue to fly the US flag and be US registered?

A. That's correct.

Q. Do you know why that's a requirement?

A. I presume it has to do with their regulations, their, their requirements as far as statutory requirements to lend money.

Q. Before going into Nicaragua in 1993, did you or anyone in the company that you're aware of, research the security issues of operating down there?

A. Security from what standpoint?

Q. From the standpoint of your ability to operate the vessels and, and not be concerned about [62] someone coming in and taking them away from you.

A. As in foreign government or –

Q. Government, yeah, primarily let's say governmental action.

A. All right. There was initial concern about that, and for that reason we went ahead and checked into the political risk insurance, which obviously that's the main concern, if we were to lose possession of the vessels due to unrest in the country or political action, is the collateral secure. So from the standpoint of the lenders and the company, once we got the political risk insurance, then our concerns about, you know, what the implications would be were alleviated.

Q. I appreciate your response. I want to just go back to my question, though. Would it be fair to say that before entering into the operation down there, yourself and others at Gulf King looked into these issues of vessel security operating in Nicaraguan waters? That was a concern?

A. It was a concern, yes.

Q. Were you aware that prior operations down there of other companies, other American companies, ran into problems of a political nature where vessels were nationalized or taken over during the civil [63] hostilities down there previously?

A. Yes.

Q. So that during the Sandanista-contra contra problems that they had before that was resolved, somewhat resolved, there were problems with Americans operating shrimp fleets in that – in those waters where their vessels were essentially nationalized or taken over?

A. We did not know of any specific American vessels that encountered that, certainly do know of shrimp boats that were nationalized.

Q. Okay. Isn't it correct that flying the US flag on your fleet of vessels not only meets the rules and regulations of your US governmental lender, but also gives you the protection of the US Government.

A. Arguably, yes; theoretically, yes.

Q. As a practical matter, you don't know how much?

MR. AMMANN: And I'll object to the extent it calls for speculation.

Q. (BY MR. STEINMAN) What were you going to say? I'm sorry. I interrupted you.

A. The question is whether or not it would entitle us to the protection of the United States [64] Government?

Q. Yes.

A. Yeah, theoretically. Not in reality, not sure how much.

Q. Okay. Are you aware –

A. Unless you want me to guess.

MR. AMMANN: Don't guess.

Q. (BY MR. STEINMAN) Are you aware of previous situations in which, for example, vessels have been taken over while flying the US flag by foreign interests and the United States Government, perhaps even through the military, has gone in and retaken the vessel or resolved that problem?

A. No, not specifically aware of that.

Q. You would agree, however, that by flying the US flag and maintaining your US registry, it may permit you to avail yourself of such services of the US Government should you run into political problems such as the nationalization of your vessels down there?

A. I would agree with that.

Q. And, therefore, along with your political risk insurance, that could very well be one of the I reasons why the US Government requires you to maintain your US registration and your US flag if [65] they're going to lend you all the money to finance the operation?

A. Correct.

Q. Specifically the Gulf King 55 and the Gulf King 49, are they mortgaged and/or financed in the manner which you just described?

A. Yes, they are.

Q. Through this Small Business Administration and the US Department of Commerce?

A. Correct.

Q. Wildlife and Fisheries?

A. National Marine Fishery Service.

Q. Okay. Can you tell me as to the Gulf King 55 and the Gulf King 49 how much money was borrowed for those two vessels?

A. The entire loan package with National Marine Fishery Service and the SBA includes preferred fleet mortgages on the entire fleet and other assets of the companies, and the total indebtedness to National Marine Fishery Service is approximately 15 million dollars. Total indebtedness to the Small Business Administration is about eight million dollars. So combined indebtedness, about 23 million dollars, for which the collateral behind that 23 million dollars is the fleet of shrimp boats and the assets in [66] Aransas Pass, the shoreside facilities of both companies, the inactive Herndon Marine Products as well as Gulf King Services going forward.

Q. Do the two companies have any other indebtedness, a major indebtedness?

A. No, not secured. There is unsecured trade debt on the Herndon Marine Products side only, but that's it, of about a million five, a million five unsecured trade debt. We have 23 million secured.

Q. And the 23 million secured is all through the government as we described?

A. That's correct.

Q. Have Herndon Products, Inc., Gulf King Services, Inc. or any of the subsidiary companies there ever

filed for protection under the United States Bankruptcy Code?

A. No.

Q. While I recognize there are always possibilities for everything, are there any such plans in place at the present time?

A. No.

Q. The indebtedness or loan agreements with the government that include these provisions requiring US registration, US flag and under which you, you opted to take political risk insurance, are they all [67] contained in one particular set of documents?

A. There are multiple loan agreements, if that's the question.

Q. That's my question. In other words –

A. There are multiple loan agreements.

Q. In other words, a loan agreement for each boat?

A. No.

Q. Okay.

A. There are two separate loans with National Marine Fishery Service. I take that back. There are three loan agreements with National Marine Fishery Service. The same collateral essentially applies to each loan agreement, but loans were incurred at different times; and the same holds true with the SBA. There are two SBA loans.

Q. When were the loans incurred, and how does the money break down to – as to what was borrowed?

A. The S – oldest loan is the SBA – is an SBA loan, initially a 2.2 million dollar loan incurred in 1980. There was a 6.2 million dollar SBA loan incurred in 1993. There was a 10 million dollar National Marine Fishery Service loan incurred in 1993 and a 2.6 million dollar National Marine Fishery service loan incurred in 1994. An additional [68] National Marine Fishery Service loan incurred in 1997 for – and the balance on that's approximately two million.

Q. And when you add all those up, you come up with the totals that you described earlier?

A. That's correct.

Q. Is the collateral furnished by the fleet placed against these loans as a group as opposed to individual mortgages on individual vessels?

A. There are individual mortgages –

Q. Okay.

A. – against the vessel.

Q. All right.

A. Against each vessel.

Q. But it's also understood that the collateral for the loans is the fleet as a whole?

A. That is correct.

Q. So I take it that with the loans coming from the two different sources and coming at different stages for different amounts over many years, there probably are a lot of loan documents related to all of this?

A. That's correct.

Q. When was the first –

A. Well –

[69] Q. I'm sorry. Go ahead. I didn't want to interrupt you. Go ahead. You were going to say something to clarify it?

A. No, that's correct. Go ahead.

Q. Okay. When was the first loan processed under which you were either required or felt it necessary to buy political risk insurance?

A. July 1993. I'm sorry, October 1993.

Q. And that was a loan for how much from what organization?

A. Ten million dollars, National Marine Fishery Service.

Q. If I were to ask for just the documents related to that transaction, that loan, is that something you could put your hands on?

A. Yes.

MR. STEINMAN: I'm going to ask that that also be produced. I guess I should be making notes of everything I'm asking for here –

MR. AMMANN: Yeah, I'm not going to agree or disagree right now.

MR. STEINMAN: – so that I can formally request those things.

MR. AMMANN: Okay.

MR. STEINMAN: It may not be necessary, [70] but –

Q. (BY MR. STEINMAN) And the – this loan we just talked about in the fall of 1993, was that – were those funds principally to be used to finance the commencement of the Nicaraguan operation?

A. No, they were used in a, in a restructuring of Herndon Marine Products, basically to infuse capital in the company to reinstate funds that were spent on the company – expansion of the company over 1990, 1991, and '92.

Q. Just because of the timing of that loan, vis-a-vis the commencement of the Nicaraguan operation, which is around that same time, and the fact that that loan agreement required the political risk insurance that we talked about associated with the Nicaraguan operation, is it fair to say that although that financing may have had other reasons, it facilitated the finance – the, the Nicaraguan operation?

A. Okay. I need to clarify something here.

Q. Sure.

A. All right. The 19 – the 1993 National Marine Fishery Service loan was procured prior to the time that the decision was made to shift boats to Nicaragua.

[71] Q. Okay. That – the loan funded in October of '93, which was really the result of about 10 month's of effort in '93 going back to the first of the year. So I do need to clarify. The loan agreement itself did not stipulate

political risk because at that point the decision hadn't been made to go to Nicaragua.

Q. Okay.

A. The loan funded in October of '93 – it was December – November of '93 when the first boats went to Nicaragua, so essentially, simultaneous with funding of the loan, we were in discussions with National Marine Fishery Service about some of the boats going to Nicaragua. So it was part of their consent to allow the boats to go to Nicaragua that this issue came up of the political risk coverage being acquired.

Q. How about the next loan that was borrowed after 10/93?

A. That was July of '94.

Q. Okay. How much was that?

A. That was a 2.2 – 2.2 or 2.6 million.

Q. From where?

A. National Marine Fishery Service.

Q. And were those funds used in whole or in [72] part to finance the Nicaraguan operation?

A. Indirectly. Again, as money came into the company.

Q. So, in other words, money that came into the company that was necessary to support the overall operation benefited the Nicaraguan operation?

A. As it did the domestic operation, yes.

Q. From the standpoint of the impact of this financing on the overall company and the fact that it enabled the company as a whole to continue to operate in the fashion that, that you and the other officers and managers of the company chose to do, was there ever any differentiation between the domestic fleet and the Nicaraguan fleet?

A. Restate that question, please.

Q. Sure. The company operated as a whole. The financing that was brought in benefited the company as a whole, including the domestic fleet and the Nicaraguan fleet; is that correct?

A. That's correct.

Q. From the standpoint of the shrimping operations, did you, as Chief Financial officer, differentiate between the domestic and the Nicaraguan operation in any way?

A. As far as an allocation of funds, of [73] proceeds from the loan?

Q. Yes.

A. No.

Q. From the standpoint of the profit made from the domestic fleet and the Nicaraguan fleet coming back into the company, was there any differentiation of the allocation of those funds?

A. All flowed to the benefit of Herndon Marine Products.

MR. AMMANN: Can you – what do you mean by differentiate? Between books or –

MR. STEINMAN: No, I'm assuming that records are kept separately for separate operations. But I'm just saying in terms of – Mr. Wheless understood my question. The benefit of the profit flowed to what entities, and was there any difference between the profit from domestic versus the profit from Nicaragua, and the answer is no distinction.

Q. (BY MR. STEINMAN) There were differences in the way you had to operate in Nicaragua versus your domestic operation; is that correct?

A. That's – be a little more specific.

Q. Okay. The – operationally – by that I mean on-site the way the boats were handled, personnel matters, payroll matters, all of the [74] day-to-day operations, there were significant differences between your Nicaraguan operation and your domestic operation, were there not?

A. That's correct.

Q. Let's call it logistics. The logistics were very different; isn't that correct?

A. Right.

Q. Would it be fair to say that from the standpoint of Gulf King and Herndon having troller divisions that catch shrimp to bring the shrimp back to the company for profit, the only distinction between the domestic and foreign division were these logistical divisions that we're talking about?

A. I believe I would agree with that.

Q. Okay. The shrimp that was caught by the domestic fleet was brought into Aransas Pass and processed in Texas; is that correct?

A. That's right.

Q. The shrimp that was caught in the Nicaraguan fleet, was that shipped back from Aransas Pass?

A. It was processed in Nicaragua and shipped from – and frozen packaged state from Nicaragua to Miami.

Q. Okay.

A. And was either sold directly out of Miami or [75] if it needed further processing, it would come through the Aransas Pass processing facility.

Q. Did Gulf King or Herndon, any of the Gulf King companies, have a facility in Miami?

A. No.

Q. Did you work through a local broker or agent?

A. No, the product in Miami was stored in a cold storage facility in Miami.

Q. Okay. I think I heard you say, "And it may have been sold directly from there"?

A. That's correct.

Q. By Gulf King out of the storage facility?

A. That's correct.

Q. No broker, no seafood distributor, no middleman in Miami?

A. That's correct.

Q. So some of the shrimp from Nicaragua, after being processed and frozen there, would be sent to Miami to be sold from Miami, and some might be transferred from Miami to Aransas Pass for further processing?

A. That's correct.

Q. That description that I just gave of the path traveled by the product, did that represent 100 [76] percent of the product from the Nicaraguan fleet?

A. Yes. One minor point of clarification there.

Q. Sure.

A. On occasion shrimp – let's see. No, that's – that's correct. We never sold shrimp directly out of Nicaragua.

Q. Okay. And is that correct for this operation from late 1993 to the present?

A. Yes, that's right, with the exception of currently there is no shrimp coming to Aransas Pass given the fact that the, that the processing plant has been shut down.

Q. Has been shut down. So everything is being handled through Miami?

A. That's correct.

Q. The process you've described of the shrimp coming off of the boats being processed and frozen in Nicaragua and shipped to Miami for sale, who established that process? In other words, who made those arrangements?

A. That was primarily arranged at the initial – or when we initiated the operation in Nicaragua, it was just

a result of that, of that process. I don't recall exactly who it was that made the –

* * *

[97] A. It would have been – I believe it would be 1996 when we first established a bank account in Nicaragua.

Q. And that's the foreign Gulf King operating bank account?

A. That's correct.

Q. Okay. Prior to 1996, how were the funds handled?

A. Out of Oceanic bank account in Nicaragua.

Q. Okay. Now, in order for Oceanic – let's talk about pre-1996, say around the time that these matters were involved in '94 and '95, let's say. In order for Oceanic to pay the bill either by check or cash, their bank account had to have funds in it?

A. That's correct.

Q. The funds that would be in their bank account to pay a major maintenance bill such as this would come from where, as pertains to a Gulf King maintenance problem?

A. It would come from Gulf King.

Q. And how would those funds be transmitted or transferred to Oceanic?

A. Via wire transfer.

Q. And it would be wire transfer from Gulf King's US bank?

[98] A. That's correct.

Q. Did Gulf King, in 1995, maintain operating bank accounts in more than one bank?

A. No.

Q. What bank did they use?

A. NationsBank.

Q. Here in Aransas Pass, Corpus Christi?

A. Corpus.

Q. Corpus. So that in 1995, if there was a major repair needed on a boat, the work would be done, Oceanic would pay either in cash or by check, and the funds to support that would come out of Oceanic's account following a wire transfer from NationsBank?

A. That's correct.

Q. Operationally, were you billed for this after the fact by Oceanic, or were you advised in advance of what it was going to be and had to transfer the money to get the work done?

A. It would depend upon the, the size of the invoice or size of the transaction. Oceanic was handling the daily operation of the fleet, and they would send statements to us on a – at least a weekly basis, sometimes more frequently. And so when we received a statement for, for the pounds of shrimp

* * *

[101] better; and it will take us out of the tax realm. I realize that from a tax standpoint there are a lot of different ways to look at things.

A. Okay.

Q. As to the captains in Nicaragua, the way they work, the way they're compensated, who they answer to, the type of job they do, it is virtually identical to the domestic fleet, is it not?

A. Yes, yes.

Q. And so you consider yourselves to be their Jones Act employer as well?

A. Yes.

Q. As to the unlicensed crew, although they may be hired by the captain and receive a share of the catch just like the captain, they work aboard vessels owned by you; is that correct?

A. Yes.

Q. And therefore from the same respect, not a tax or others' respect, you are their Jones Act employer?

A. Yes.

Q. And that's true in the Nicaraguan fleet as well as the domestic fleet?

A. Yes.

Q. The process of the payroll in Nicaragua [102] pre-1996 with the involvement of Oceanic – and I'm

going to ask you a little bit more about Oceanic in a little while. But just in terms of how the crew settlements were accomplished in 1995, let's say, the actual payment of cash and transmission of the shares of catch by cash to the crew members was done through Oceanic, was it not?

A. That's correct.

Q. Were the funds to support these crew settlements handled the same way as you just described the maintenance?

A. Yes.

Q. So that when it became known at the end of a trip how much money was needed to settle with the crew, a wire transfer was made from Gulf King's account at NationsBank to Oceanic's account in a foreign Nicaraguan bank and from that, cash would be extracted to pay the crew?

A. That's correct.

Q. And Oceanic would either bill you or on some timing basis, perhaps in advance a little bit, indicate to you how much money they needed transferred to cover a particular crew settlement or payroll?

A. Yes.

* * *

[106] that fleet about that operation that are handled here in Aransas Pass?

A. I hadn't thought about it in that light. Certainly, from the standpoint of overall corporate issues that the

company is facing and deployment of company's assets generally, those decisions would be made here.

Q. Okay. And a little bit more – and to break that down perhaps into a little bit more detail, other than the day-to-day operations of the kind of things we talked about with maintenance and payroll, which are funded from here through wire transfers, major financial decisions concerning the Nicaraguan operation are done here; is that correct?

A. That's correct.

Q. The funds that flow from that operation, whether profitable or not, how those funds are accumulated, handled, managed, and perhaps redisbursed back to Nicaragua for expenses, that's all done here?

A. Correct.

Q. The decision to deploy a boat or a group of boats to Nicaragua or return them to the United States, that decision would be made here?

A. Yes, that's right.

[107] Q. If, for example, one of the boats in Nicaragua was to be sold, there is no one in Nicaragua who could decide to sell a boat down there; is that correct?

A. That's correct.

Q. Any such decisions would have to be made by Gulf King here in Texas?

A. That's correct.

Q. And when you talk about day-to-day operations, other than where the boats will fish and how that fishing operation may be done out on the water, which we presume the captain has control over, all of the other aspects of the Nicaraguan operation are handled by either the fleet manager or Gulf King personnel in Nicaragua who answer to the Texas management?

MR. AMMANN: I object to the extent it calls for speculation on the – Jay's part and also it's not qualified as to the time period.

Q. (BY MR. STEINMAN) I'm talking about now, and then I'll get to 1995.

A. Okay. That was a broad statement. Could you run that one again, please?

MR. STEINMAN: Could you read that back for me or for Mr. Wheless, please.

* * *

[119] the question.

Q. (BY MR. STEINMAN) Okay. We've already discussed how in the – even in the early stages the captains would hire the unlicensed deckhands and other crew members, that they would for Jones Act employer purposes be employees of Gulf King and that the funds to pay both the captains and those individual crew members came from Gulf King, although administratively was paid through Oceanic; is that correct?

A. Correct.

Q. And that was true from the very beginning; is that, is that correct?

A. Right.

Q. So that even though the early American captains and perhaps even some of the Nicaraguan captains later had to rely on the local Oceanic people to assist them in recruiting unlicensed deckhands and people like that to fill out the crews of the boats, everything else I just said remains the same; that's all correct as far as the employee status of the crew members and how they were paid?

A. Yes.

Q. Okay. Let me say one more thing about that to make it even more clear, if I can. By virtue of

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[128] translated into dollars, you were then informed by Oceanic – this is pre-1996 – as to how many dollars needed to be transferred by wire transfer to cover the payroll disbursements; is that correct?

A. Yes, that's right.

Q. Once Oceanic received your US dollars by wire transfer from NationsBank here in Texas, they would then convert through a Nicaraguan bank the US dollars into Nicaraguan cordobas and pay the crew members in their local currency; is that correct?

A. Yes, that's correct.

Q. So that the payment of the crew payroll disbursements by – was done by – initially, by Gulf King in US dollars but actually transmitted to the crew members in local currency by Oceanic?

A. Yes, that's right.

Q. And for this service, along with all the other services we talked about, Oceanic was paid a flat fee?

A. Yes.

Q. Do you know Captain Eddie Walsh?

A. Yes, I know of Eddie Walsh. I would recognize him if he walked in the door.

Q. Is he still employed by the company?

A. No, he's not.

* * *

[134] request for funds, and the document underneath is the support for it?

A. Yes, that's right.

Q. The detailed support for it?

A. That's correct.

Q. And although we've been provided with various copies of these type of funding requests or funding receipts or reports as pertains to these two cases, there was a constant procession of this sort of document to Texas to request funding and to give operational expense information; is that correct?

A. Yes, that's right.

Q. How did you communicate between the offices in Aransas Pass and the offices at El Bluff?

A. Fax, via fax and telephone, primarily fax.

Q. A lot of fax transfer of documentation?

A. Yes.

Q. How often would the management and anybody at all involved in management – or employees, let's say, in general of Gulf King in Aransas Pass speak with the existing fleet manager in Nicaragua at any one time?

A. Two to three times a week.

Q. By telephone?

A. Yes.

* * *

[136] you any sort of reporting, written reporting, on any regular basis?

A. A daily log, fleet log, would be faxed up showing which boats are out fishing on a given day and which boats are at the dock and then just a note at the bottom as to what the general production levels are on a day-by-day basis.

Q. And the responsibility for transmitting that was with the fleet manager?

A. He originated the document, yes, so he had to make arrangements to have it faxed.

Q. He prepared it and sent it to you. I'm not saying he stood by the fax machine, but he was the one who made sure that got prepared and sent daily?

A. Right.

Q. Were there any regular documents that were routinely sent to the fleet manager on a daily basis?

A. No.

Q. In addition to the regular daily log report from the fleet manager, there were all these various types of financial documents we talked about; is that correct?

A. Yes, that's right.

Q. Were there any other types of documents that were routinely transmitted back and forth?

[137] A. All the other documents transmitted on a regular basis had to do with shrimp that was processed at the plant so that we could tell how much shrimp we had in inventory at any given time.

Q. Okay. If the fleet manager had to undertake a major repair that was going to cost thousands of dollars, would he fax a report about that up to the United States, or would he call and discuss that with someone by telephone?

A. That would normally be a telephone conversation.

Q. Mr. Hutchins in his affidavit makes the statement, "At all times since early 1994, all maintenance repairs and servicing of the MV Gulf King 55 and her appurtenances have been accomplished in Nicaragua." It's correct, is it not, that decisions concerning all of those maintenance and repairs would have been made by the fleet manager; is that correct?

A. Since early 1994?

Q. Yes.

A. Yes, fleet manager would have been involved.

Q. And possibly that fleet manager's opinion or decision would have to be ultimately approved or decided by management in Aransas Pass; is that correct?

[138] MR. AMMANN: Objection, that's a little vague as to whether it's a screw or an engine overhaul.

Q. (BY MR. STEINMAN) I'll go back and say the maintenance repairs and servicing would be part of the fleet manager's responsibilities as you previously described. That's one of his principal duties, but that if a major repair or problem would have to be accomplished or fixed in Nicaragua, he would have to consult with management in Aransas Pass?

A. Yes.

Q. And in any event, the cost or expense of all such maintenance repairs and servicing of the vessel would be borne by Gulf King through transfer of funds from Aransas Pass?

A. Yes, that's right.

Q. When a crew member is injured aboard one of the Nicaraguan vessels and requires medical treatment in the – from local medical facilities, is the expense for that medical treatment passed along through the ordinary expense channels to be reimbursed by Gulf King in Aransas Pass?

A. Yes.

Q. And the reason I put that in general terms [139] is I assume that prior to 1996 that would have been transmitted up and a request for funds transferred by

Oceanic, and since then it's been done by your own person; is that correct?

A. That's correct.

Q. The foreign bank account opened in the name of Gulf King, as your company was able to assume more independent status starting in 1996, is that ever replenished or funded from Nicaragua by the proceeds of the operation down there?

A. No, it's not.

Q. So whether – from the standpoint of having the funds passed through Oceanic as an agent or through your own account as it's been since established, all funds allocated for payroll and expenses of the Nicaraguan operation must come from Aransas Pass and the accounts of Gulf King up here in the United States?

A. Yes, that's right.

Q. There's no independent structure in Nicaragua for selling or generating cash flow in Nicaragua; is that correct?

A. The only exception is that there is a little bit of work done at the dry dock facility down there for local boats, for non Gulf King boats, and that [140] does generate some cash into the operation –

Q. But the over –

A. – but that would be it.

Q. The overall expense of the operation is funded from here, not from down there?

A. That's right.

Q. I believe you answered this question in a different context earlier, but I'll ask it again. When was the first time that you became aware of the accidents and injuries to these two individuals, Raymundo Cerrato Solano and Victor Urbina?

A. The first time I was aware of those incidents was when we received correspondence from you.

Q. Okay. So to the extent that funds may have been disbursed to them, either as ongoing payroll allowances while they were disabled or in some form of settlement as a cash payment at the conclusion of their case down there, you would not have been directly involved in any of that?

A. That's right.

Q. And I take it from what you're saying, you would have had no knowledge of it; you didn't know anything about it?

A. That's correct.

* * *

[153] Jay.

A. I don't know the full answer to that.

Q. (BY MR. STEINMAN) Okay. Let me, let me put it to you a different way. Since the vessels have been in Nicaragua, have they been subject to any formal US Coast Guard inspections?

A. The only inspection I'm aware of by any branch of the US Government since the boats have been in

Nicaragua has been the National Marine Fishery Service as it pertains to the use of total excluder devices, which are US-imposed standards. And so I know the vessels have been checked for that.

Q. And they were –

A. Beyond that, I'm not aware of anything.

Q. They were checked by an official of that agency by traveling to Nicaragua and checking them?

A. Yes, in conjunction with the Fishery's Department of Nicaragua.

Q. Other than that, as far as you know, since the vessels have been in Nicaragua, they have not been subject to any US Coast Guard type inspections?

A. No, they have not.

Q. How about your domestic fleet, are they inspected by the coast guard?

A. Yes.

* * *

[156] the United States; is that correct?

A. That's correct.

Q. And I take it the company is hopeful of being able to continue the Nicaraguan operation down there?

A. We are hopeful to be able to continue operations, period –

Q. Okay.

A. – given the financial condition of the company.

Q. All operations of the company?

A. Or any operation of the company.

Q. Okay.

A. Along those lines, with the indebtedness that the company has, secured indebtedness, the secured lenders, the National Marine Fishery Service and the SBA are severely under-collateralized, given the state of the industry and the value of the assets that they hold today. And our existence today as an operating entity anywhere, whether it's Gulf or Mexico or the boats in Nicaragua, it's purely by the grace of the US Government; and there is no long-term commitment from the government right now. We're on a year-by-year deal with the US Government, and the indebtedness we have is not being serviced for any of [157] the operation. We've got a standstill basically in place right now with the US Government.

Q. So the government, the United States Government, which provided over a number of years, as we've previously discussed, the financing for your operations, including the Nicaraguan operation, has also given some relief to the company from having to meet all of their obligations under those lines?

A. That's correct, but nothing restructured, nothing forgiven. It's just – like I say, it's a standstill right on their part.

Q. And so I take it from what you're saying that were it not for the United States Government through these various agencies giving you the funds and the relief from the indebtedness for those funds, the operation in

Nicaragua, as well as the rest of the operations of this company, would cease to exist?

A. That's correct, that's correct. It would have ceased a year and a half ago.

Q. So to say you owe it all to the United States Government would be true both literally and figuratively?

A. We owe it all, plus some; that's right.

Q. The Nicaraguan government, in providing you with licensing and some of the other various

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